DOCUMENT RESUME

ED 101 018	UD 014 585
TITLE	Busing of School Children: Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, Ninety-Third Congress, Second Session on S.179, S.287, S.619, S.1737, and S.2336; Bills Related to Busing of Schoolchildren. Hearings Held Washington, D.C., February 19-21, 1974.
INSTITUTION	Congress of the U.S., Washington, D.C. Senate Committee on the Judiciary.
PUB DATE	Feb 74
NOTE	353p.; Pages 161-193, a copyrighted article from the "North Carolina Law Review," have been deleted from this document
AVAILABLE FROM	Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 ($2.85)
EDRS PRICE	MF-$0.75 HC-$17.40 PLUS POSTAGE
DESCRIPTORS	Bus Transportation; *Civil Rights; *Federal Legislation; Forced Choice Technique; *Integration Methods; Neighborhood Schools; Policy Formation; Political Issues; Public Policy; School Community Relationship; *School Integration; *Student Transportation; Transfer Programs

ABSTRACT

These hearings on school busing are comprised of the testimony of a number of U.S. Senators, Representatives, school board members, and representatives from civil rights organizations. "Material for the Record" consists of prepared statements, letters, and newspaper and periodical articles. The full texts of bills on busing, numbers S.179, S.287, S.619, S.1737, and S.2336, all enacted by the 93rd Congress, are also reprinted here. In addition are appended statements and letters from Congressmen, school board members, and others, and judicial decisions and briefs relating to the following: Amicus Curiae brief for the Classroom Teachers' Association of the Charlotte-Mecklenburg School System; Brown vs. Board of Education; Green vs. County School Board of New Kent County, Va.; Ex parte William H. McCardle; and, Swann vs. Charlotte-Mecklenburg Board of Education. (RJ)

ED 101 019

BUSING OF SCHOOLCHILDREN

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-THIRD CONGRESS

SECOND SESSION

ON

S. 179, S. 287, S. 619, S. 1737, and S. 2336

BILLS RELATED TO BUSING OF SCHOOLCHILDREN

FEBRUARY 19, 20, AND 21, 1974

Printed for the use of the Committee on the Judiciary

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BUSING OF SCHOOLCHILDREN

TUESDAY, FEBRUARY 19, 1974

U.S. Senate,
Subcommittee on Constitutional Rights
of the Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 1318, Dirksen Senate Office Building, Senator Sam J. Ervin, Jr. (chairman), presiding.

Present: Senators Ervin, Gurney, Mathias.

Also present: William E. Pursley, Jr., chief counsel, Senate Subcommittee on Revision and Codification of Laws.

Senator Ervin. The Subcommittee on Constitutional Rights will come to order.

OPENING STATEMENT OF THE CHAIRMAN

Today the Senate Subcommittee on Constitutional Rights begins a 3-day series of hearings to consider the problem of the forced busing of schoolchildren designed to achieve "racial balance" in the public schools and various legislative proposals introduced in the Senate to put an end to this unfortunate practice. We will give special consideration to four bills which have been referred to this subcommittee for study—S. 179, S. 287, S. 619, and S. 1737, which Senator James Allen of Alabama, and I introduced.

During the 19 years I have served in the U.S. Senate, I can think of no group of people who have stood in greater need of relief from Government tyranny than the thousands of innocent, little schoolchildren who are being bused to schools many miles away from their neighborhoods in order to satisfy the social theories of Federal bureaucrats and to comply with constitutionally unsound Federal court orders. Under the guise of enforcing the 14th amendment's "equal protection" clause, these bureaucrats and Federal courts have undermined any reasonable understanding of the fundamental principle of "equal protection of the law." Although there are pious assertions to the contrary, what has in fact occurred is the assignment and transportation of schoolchildren to public schools on the basis of race in order to achieve a certain, specified "racial balance." In my sincere opinion, this is absolutely contrary to "equal protection of the law."

Community after community throughout America has been threatened with the destruction of their neighborhood schools. Thousands of parents—black and white—and I might add Chinese—have worried about the safety and health of their children as they daily negotiate long, arduous bus rides, often commencing in the darkness of early morning and ending in the dusk of late afternoon or evening. There has been a significant and dangerous exodus from the public schools by children whose parents simply will not risk the hazards attendant to these long and tiring bus rides. The cry of protest and the plea for relief are now heard from almost every quarter of America.

These hearings represent an effort to examine the impact of this senseless, forced busing of schoolchildren to achieve "racial balance" and to consider legislative methods which will effectively put an end to this horrible tyranny. It is my earnest hope that the testimony taken during the course of our hearings will help us to understand more clearly the urgency of enacting legislation which will truly insure "equal protection of the law" for the schoolchildren of America.

I would like for the four bills referred to in this statement to be printed in full in the record of these hearings and to this end I make copies of these four bills available to the reporter.

[The above referred to bills follow:]

93d CONGRESS
1st Session

S. 179

IN THE SENATE OF THE UNITED STATES

January 4, 1973

Mr. Griffin introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To limit the jurisdiction of Federal courts to issue busing orders based on race, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Student Antibusing Act of 1973".

LIMITATIONS ON FEDERAL COURTS AND AGENCIES

Sec. 2. (a) No court of the United States shall have jurisdiction to make any decision, enter any judgment, or issue any order the effect of which would be to require that pupils be transported to or from school on the basis of their race, color, religion, or national origin.

(b) No department, agency, officer, or employee of the

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United States, empowered to extend Federal financial assistance to any program or activity at any school by way of grant, loan, or otherwise, shall withhold or threaten to withhold any such Federal financial assistance in order to coerce or induce the implementation or continuation of any plan or program the effect of which would be to require that pupils be transported to or from school on the basis of their race, color, religion, or national origin.

(c) Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court the effect of which is or would be to require that pupils be transported to or from school on the basis of race, color, religion, or national origin, the effectiveness of such order shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired.

EXPEDITED JUDICIAL DETERMINATION

SEC. 3. (a) The district courts of the United States shall have and shall exercise jurisdiction of proceedings involving the validity or applicability of section 2 of this Act and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

(b) In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(c) It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

SEPARABILITY

SEC. 4. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remaining provisions of this Act, or the application of such provision to other persons or circumstances, shall not be affected thereby.

93D CONGRESS
1ST SESSION

S. 287

IN THE SENATE OF THE UNITED STATES

JANUARY 11, 1973

Mr. SCOTT of Virginia introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To clarify the jurisdiction of certain Federal courts with respect to public schools and to confer such jurisdiction upon certain other courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no court created by Act of Congress and having general jurisdiction, original or appellate, with respect to cases or controversies arising under the laws or Constitution of the United States, shall have any jurisdiction to hear or decide cases or controversies involving the public schools. The jurisdiction terminated by this Act shall be vested in the courts of the several States and, with respect to such cases and controversies arising in the District of Columbia

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or in any other territory or possession of the United States, in the Federal courts of an essentially local jurisdiction in such District, territory, or possession. In each such case or controversy, there is vested in the Supreme Court of the United States appellate jurisdiction by writ of certiorari to the highest State or territorial court exercising jurisdiction over such case or controversy.

93D CONGRESS
1ST SESSION

S. 619

IN THE SENATE OF THE UNITED STATES

JANUARY 31, 1973

Mr. ALLEN (for himself, Mr. BAKER, Mr. BUCKLEY, Mr. HELMS, Mr. NUNN, Mr. SCOTT of Virginia, Mr. SPARKMAN, Mr. STENNIS, Mr. TALMADGE, and Mr. THURMOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To prescribe uniform criteria for formulating judicial remedies for the elimination of dual school systems.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Uniform Criteria Act of 1973".

POLICY AND PURPOSE

SEC. 2. (a) The Congress declares it to be the policy of the United States that—

(1) all persons in the United States are entitled to freedom from coercion imposed in the exercise of limitless discretionary powers by any branch, agency, or officer of the United States Government;

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(2) it is in the public interest to terminate at the earliest practical date by means consistent with the Constitution the involvement of United States courts in decisions affecting the operation, management, and control of public schools.

(b) In order to carry out this policy it is the purpose of this Act to specify appropriate criteria for the formulation of remedies for the orderly elimination of the vestiges of dual school systems.

FINDINGS

SEC. 3. (a) The Congress finds that—

(1) dual school systems as defined by the courts have been effectively dismantled in the United States;

(2) in the process of eliminating dual school systems, many local educational agencies have been required to reorganize their school systems and undertake massive reassignments of students and to engage in the extensive transportation of such students;

(3) the guidelines provided by the courts for fashioning remedies to dismantle previously-maintained dual school systems and for the elimination of the vestiges of dual systems have been acknowledged by the Supreme Court of the United States to be "incomplete and imperfect," and the Congress finds that they are particularly inadequate from the standpoint of pro-

viding criteria for determining the extent to which an educational agency is required to reassign or transport students to eliminate the vestiges of the dual school system;

(4) the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend a large amount of funds, thereby depleting their financial resources available for the maintenance or improvement of the quality of educational facilities and instruction provided;

(5) transportation of students is excessive when it creates serious risks to the health and safety of students, or disrupts the educational process carried out with respect to such students, or impinges significantly on their educational opportunity;

(6) the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades;

(7) the neighborhood is the appropriate basis for determining public school assignments in the first six grades;

(8) the assignment of students to schools on the basis of geographic attendance areas drawn on a racially

nondiscriminatory basis is educationally sound and is consistent with public policy long recognized by Congress.

(9) it is contrary to public policy to require an educational agency to attain or maintain a balance, on the basis of race, color, sex, national origin, or socio-economic classes of students among its schools;

(10) it is contrary to the public interest to require an educational agency to make year-by-year school assignments to adjust the racial composition of student bodies after desegregation has been accomplished and racial discrimination through official action is eliminated from the separate school systems in the Nation;

(11) in the interest of orderly administration of public schools, it is urgent that school authorities be provided authoritative criteria by which to determine what is required by Congress and the courts to eliminate the vestiges of previously maintained dual school systems;

(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems.

TITLE I—ASSIGNMENT PROVISIONS

ASSIGNMENT ON NEIGHBORHOOD BASIS

SEC. 101. Subject to the other provisions of this title, the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal protection of the laws unless such assignment is made for the purpose of segregating students on the basis of race, color, sex, or national origin.

BALANCE NOT REQUIRED

SEC. 102. The failure of an educational agency to attain a balance, on the basis of race, color, sex, national origin, or socioeconomic status of students among its schools shall not constitute a denial of equal protection of the laws.

TITLE II—REMEDIES

FORMULATING REMEDIES; APPLICABILITY

SEC. 201. In formulating a remedy for a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal protection of the laws.

SEC. 202. In formulating a remedy for a denial of the equal protection of the laws, which may involve the transportation of students, a court, department, or agency of the

United States shall consider and make specific findings on the efficacy in correcting such denial of the following remedies and shall require implementation of the first of the remedies set out below, or on the first combination thereof which would remedy such denial;

(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 203;

(e) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 203 and 204 of this Act.

TRANSPORTATION OF STUDENTS

SEC. 203. (a) No court, department, or agency of the United States shall, pursuant to section 202, order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student.

(b) No court, departments, or agency of the United States shall require directly or indirectly the transportation of any student if such transportation poses a risk to the health of such student or constitutes a significant impingement on the educational process with respect to such student.

(c) When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has no vestiges of a dual system, and thereafter residential shifts in population occur which result in school population changes in any school within such a desegregated school system, no educational agency shall because of such shifts be required by any court, department, or agency of the United States to formulate, or implement any new desegregation plan, or modify or implement any modification of the court approved desegregation plan to compensate wholly or in part for such shifts in school population.

DISTRICT LINES

SEC. 204. In the formulation of remedies under section 201 or 202 of this Act, the lines drawn by a State, subdividing its territory into separate school districts, shall not be ignored or altered except where it is established that the lines were drawn for the purpose of segregating children among public schools on the basis of race, color, sex, or national origin.

VOLUNTARY ADOPTION OF REMEDIES

SEC. 205. Nothing in this Act prohibits an educational agency from proposing, adopting, requiring, or implementing any plan of desegregation, otherwise lawful, that is at variance with the standards set out in this title, nor shall any court, department, or agency of the United States be prohibited from approving implementation of a plan which goes beyond what can be required under this title, if such plan is voluntarily proposed by the appropriate educational agency.

REOPENING PROCEEDINGS

SEC. 206. On the application of an educational agency, court orders, or desegregation plans under title VI of the Civil Rights Act of 1964 in effect on the date of enactment of this Act and intended to end segregation of students on the basis of race, color, or national origin, shall be reopened and modified to comply with the provisions of this Act. The Attorney General shall assist such educational agency in such reopening proceedings and modifications.

TERMINATION OF ORDERS

SEC. 207. Any court order requiring the desegregation of a school system shall be terminated, if the court finds the schools of the defendant educational agency are a unitary school system, one within which no person is to be effectively excluded from any school because of race, color, or national origin, and this shall be so, whether or not such school system was in the past segregated de jure or de facto. No additional order shall be entered against such agency for such purpose unless the schools of such agency are no longer a unitary school system.

TITLE III—DEFINITIONS

SEC. 301. For the purposes of this Act—

(a) The term "educational agency" means a local educational agency or a "State educational agency" as defined by section 801 (k) of the Elementary and Secondary Education Act of 1965.

(b) The term "local educational agency" means a local educational agency as defined by section 801 (f) of the Elementary and Secondary Education Act of 1965.

(c) A "dual school system" is one in which students are assigned to schools solely on the basis of race, color, sex, or national origin for the purpose of segregating such students in schools of the system.

(d) A "unitary school system" is one in which an educational agency is not effectively excluding any person from any school because of race, color, or national origin, whether or not such school system was in the past segregated de jure or de facto.

(e) The term "segregation" means the operation of a school system in which students are assigned to schools of an educational agency on the basis of race, color, sex, or national origin or within a school on the basis of race, color, or national origin.

(f) An educational agency shall be deemed to transport a student if any part of the cost of such student's transportation is paid by such agency.

TITLE IV—MISCELLANEOUS PROVISIONS

SEC. 401. Section 709 (a) (3) of the Emergency School Aid Act is hereby repealed.

SEPARABILITY OF PROVISIONS

SEC. 402. If any provision of this Act or of any amendment made by this Act, or the application of any such provision to any person or circumstance, is held invalid, the remainder of the provisions of this Act and of the amendments made by this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

93D CONGRESS
1ST SESSION

S. 1737

IN THE SENATE OF THE UNITED STATES

MAY 8, 1973

Mr. ERVIN (for himself and Mr. ALLEN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend the Civil Rights Act of 1964 to provide for freedom of choice in student assignments in public schools.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Student Freedom of Choice Act".

SEC. 2. The Civil Rights Act of 1964 (42 U.S.C. 1971–1975a–1975d, 2000a–2000h–6) is amended by adding at the end thereof the following new title:

"TITLE XII—PUBLIC SCHOOL—FREEDOM OF CHOICE

"SEC. 1201. As used in this title—

"(a) 'State' means any State, district, Commonwealth, territory, or possession of the United States.

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"(b) 'Public school' means any elementary or secondary educational institution, which is operated by a State, subdivision of a State, or governmental agency within a State, or any elementary or secondary educational institution which is operated, in whole or in part, from or through the use of governmental funds or property, or funds or property derived from a governmental source.

"(c) 'School board' means any agency which administers a system of one or more public schools and any other agency which is responsible for the assignment of students to or within such system.

"(d) 'Student' means any person required or permitted by State law to attend a public school for the purpose of receiving instruction.

"(e) 'Parent' means any parent, adoptive parent, guardian, or legal or actual custodian of a student.

"(f) 'Faculty' means the administrative and teaching force of a public school system or a public school.

"(g) 'Freedom of choice system' means a system for the assignment of students to public schools and within public schools maintained by a school board operating a system of public schools in which the public schools and the classes it operates are open to students of all races and in which the students are granted the freedom to attend public schools and classes chosen by their respective parents from among the public schools and classes available for the instruction of students of their ages and educational standings.

"Sec. 1202. No department, agency, officer, or employee of the United States empowered to extend Federal financial assistance to any program or activity at any public school by way of grant, loan, or otherwise shall withhold, or threaten to withhold, such financial assistance from any such program or activity on account of the racial composition of the student body at any public school or in any class at any public school in any case whatever where the school board operating such public school or class maintains, in respect to such public school and class, a freedom of choice system.

"Sec. 1203. No department, agency, officer, or employee of the United States empowered to extend Federal financial assistance to any program or activity at any public school by way of grant, loan, or otherwise shall withhold, or threaten to withhold, any such Federal financial assistance from any such program or activity at such public school to coerce or induce the school board operating such public school to transport students from such public school to any other public school for the purpose of altering in any way the racial composition of the student body at such public school or any other public school.

"Sec. 1204. No department, agency, officer, or employee of the United States empowered to extend Federal financial assistance to any program or activity of any public school in any public school system by way of grant, loan, or otherwise shall withhold or threaten to withhold any such Federal financial assistance from any such program or activity at such public school to coerce or induce any school board operating such public school system to close any public school, and transfer the students from it to another public school for the purpose of altering in any way the racial composition of the student body at any public school.

"SEC. 1205. No department, agency, officer, or employee of the United States empowered to extend Federal financial assistance to any program or activity at any public school in any public school system by way of grant, loan, or otherwise shall withhold or threaten to withhold any such Federal financial assistance from any such program or activity at such public school to coerce or induce the school board operating such public school system to transfer any member of any public school faculty from the public school in which the member of the faculty contracts to serve to some other public school for the purpose of altering the racial composition of the faculty at any public school.

"SEC. 1206. Whenever any department, agency, officer, or employee of the United States violates or threatens to violate section 1202, section 1203, section 1204, or section 1205 of this Act, the school board aggrieved by the violation or threatened violation, or the parent of any student affected or to be affected by the violation or threatened violation, or any student affected or to be affected by the violation or threatened violation, or any member of any faculty affected or to be affected by the violation or threatened violation may bring a civil action against the United States in a district court of the United States complaining of the violation or threatened violation. The district courts of the United States shall have jurisdiction to try and determine a civil action brought under this section irrespective of the amount in controversy and enter such judgment or issue such order as may be necessary or appropriate to redress the violation or prevent the threatened violation. Any civil action against the United States under this section may be brought in the judicial district in which the school board aggrieved by the violation or threatened violation has its principal office, or in the judicial district in which any school affected or to be affected by the violation or threatened violation is located, or in the judicial district in which a parent of a student affected or to be affected by the violation or threatened violation resides, or in the judicial district in which a student affected or to be affected by the violation or threatened violation resides, or in the judicial district in which a member of a faculty affected or to be affected by the violation or threatened violation resides, or in the judicial district encompassing the District of Columbia. The United States hereby expressly consents to be sued in any civil action authorized by this section, and expressly agrees that any judgment entered or order issued in any such civil action shall be binding on the United States and its offending department, agency, officer, or employee, subject to the right of the United States to secure an appellate review of the judgment or order by appeal or certiorari as is provided by law with respect to judgments or orders entered against the United States in other civil actions in which the United States is a defendant.

"SEC. 1207. No court of the United States shall have jurisdiction to make any decision, enter any judgment, or issue any order requiring any school board to make any change in the racial composition of the student body at any public school or in any class at any public school to which students are assigned in conformity with a freedom of choice system, or requiring any school board to transport any students from one public school to another public school or from one place to another place or from one school district to another school district in order to effect a change in the racial composition of the student body at any school or place or in any school district, or denying to any student the right or privilege of attending any public school or class at any public school chosen by the parent of such student in conformity with a freedom of choice system, or requiring any school board to close any school and transfer the students from the closed school to any other school for the purpose of altering the racial composition of the student body at any public school, or precluding any school board from carrying into effect any provision of any contract between it and any member of the faculty of any public school it operates specifying the public school where the member of the faculty is to perform his or her duties under the contract."

Senator **Ervin**. Senator Gurney, do you have a statement?
Senator **Gurney**. Yes.

OPENING STATEMENT OF HON. EDWARD J. GURNEY, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator **Gurney**. Mr. Chairman, I am pleased to be a part of these important hearings on legislation designed to prohibit this obnoxious practice of forced busing.

This issue is not new to any of us. As a matter of fact, looking back over Senate floor action for the past 5 years, I would venture to say that busing has consistently been a major subject of debate and rollcall votes. The problem is that we always seem to approach the busing question through amendments to other bills, rather than through the normal committee procedure.

As one who has introduced and cosponsored a number of bills and amendments to prohibit forced busing, I am particularly pleased that we are finally giving this national issue its "day in committee." I sincerely hope this subcommittee, and the full Judiciary Committee will follow through on this issue, and that we will be able to bring legislation to the floor for Senate action this year.

There is no doubt about the fact that we must provide a quality integrated education system for all of our youngsters. The well-being of our Nation, and the caliber of our future leaders requires such an investment. I firmly believe that forced busing is not the answer to this need.

Furthermore, I feel that a majority of the American people share this sentiment. In a Gallup poll taken in 1971, opposition to forced busing measured an overwhelming 77 percent on a national level. In March of 1972, a straw ballot referendum relating to forced busing, on the Presidential primary ballot in Florida reflected my own State's opposition to forced busing at a rate of nearly 3 to 1—or approximately 75 percent. Even the Civil Rights Commission admitted that a poll they conducted showed 70 percent of those interviewed opposed to forced busing. This is just a sampling of a great number of polls taken throughout the country—similar polls with similar results.

And if the will of the people is not enough to convince those who represent them, there are a host of studies, such as those done by the Policy Institute of Syracuse, the National Association of Secondary School Principals, and by David J. Armor at Harvard, which conclude that forced busing is not improving education and that it is increasing racial tension. These studies deal with the empirical evidence—the facts—and the facts show that forced busing is simply not working.

Forced busing is as morally wrong as the problem it seeks to alleviate. It is physically and motionally detrimental to those involved. It increases racial tension. It does not improve education, and the cost to the taxpayers is staggering.

Now as if the preceding list of negatives is not enough, we must also consider the fact that forced busing is escalating our energy crisis.

Consider, for example, that in Jacksonville, Fla., the number of buses required to transport students under court order increased from 200 to 423.

If the Chairman will permit me, in Charlotte, N.C., a court order increased school transportation costs from $784,000 to $1.6 million—and that was before the real fuel crunch began.

To the motorist who sits in line for 2 hours every week waiting for gas—assuming, that is, that he can find a station that has gas—it is infuriating to know that his child's schoolbus may be traveling 30 to 40 unnecessary miles a day with no fuel problems.

This needless waste of energy may well be the straw that breaks the camel's back, and I for one will be glad to see it break.

The bills we are considering today represent the statutory approach to prohibiting forced busing. Last April, the Judiciary Committee heard testimony on several proposed constitutional amendments to accomplish this purpose. In view of past history on this issue, my own inclination is that the amendment route, although more cumbersome and time consuming, may prove to be the only sure way to accomplish our purpose. I say this because I have watched the courts time and again strike down every law we have passed to prohibit forced busing.

I am always hopeful, however, that Congress will find some way to stop this dangerous practice, and I will actively support any effort, statutory or constitutional, to bring this about.

Senator ERVIN. I might add that I favor statutes to put an end to this tyranny immediately, and a constitutional amendment to put an end to it forever.

I am reminded somewhat of a story about the man who was away from home and received a telegram from his undertaker saying, "Your mother-in-law died today, shall we cremate or bury?" He wired back and said, "Take no chances: Cremate and bury."

I would cremate first by legislation and then bury by constitutional amendment.

Senator GURNEY. That is a good story, to the point, and I certainly agree with him.

Senator ERVIN. At Senator Hruska's request I would like to have printed at this point in the record a statement by Senator Hruska.

OPENING STATEMENT OF HON. ROMAN L. HRUSKA, A U.S. SENATOR FROM THE STATE OF NEBRASKA

Mr. Chairman, it is with great interest that I note the commencement of hearings on a number of measures which would provide for certain statutory limitations on Federal courts to formulate desegregation decrees. It is my sincere hope that these hearings will provide the Congress with additional views, arguments, and insights on an issue of substantial importance to all our citizens.

Since the landmark Supreme Court decision of *Brown* v. *Board of Education* in 1954, and the passage of the Civil Rights Act of 1964, this Nation has been engaged in a most complex, and at times turbulent process of carrying out the judicial decree of the High Court and the will of the Congress. The struggle over the constitutional issue of the division of powers between the Federal Government and the States has resulted in a patchwork of judicial decisions. The formulation of a wide variety of decrees to achieve desegregation in our public schools has also hindered the uniform application of the statutes and case law.

Previous congressional efforts to provide statutory limitations on the discretionary equity jurisdiction of U.S. district court judges have foundered on the issue of Federal intervention in de facto school segregation situations. In the past there has been extended debate on the question of the power of the Federal Government's involvement in this area. Today, however, these hearings focus on one specific issue, whether or not U.S. district court judges should be limited by congressional statute in the exercise of their equity power jurisdiction. I commend the chairman, and the other sponsors of the measures under consideration, for once more pursuing an examination of this most complex issue.

Each of the measures before the subcommittee offers possible statutory limitations on the equity jurisdiction of U.S. district court judges in the exercise of their judicial responsibilities. Although the means to achieving a common end may differ between these bills, their thrust and direction are consistent. That thrust and direction is to provide a sound congressional solution to assist Federal district court judges in carrying out their statutory duties within the framework of the due process guarantees of the Constitution.

The many issues raised by the metropolitan area remedies handed down by the district courts in the Richmond and Detroit cases compel a long overdue legislative response. The decisions in these cases clearly exemplify the great dangers of attempting to redress through the schools denials of opportunity whose roots lie in complex combinations of decisions and practices over many generations in the fields of housing, employment, transportation, business licensing, and law enforcement. At a time when there is growing recognition of the need for regional cooperation in metropolitan areas to resolve a wide variety of social, economic, and environmental issues, the effect of these metropolitan-wide desegregation remedies is to put adjacent political jurisdictions in conflict and to reinforce antiurban attitudes in State legislatures.

Mr. Chairman, from February 1970 until the end of 1972 I served as the ranking minority Member of the Senate Select Committee on Equal Educational Opportunity. This committee was charged with studying "the effectiveness of existing laws and policies in assuring equality of educational opportunity, including policies of the United States with regard to segregation on the grounds of color or national origin * * * and to examine the extent to which policies are applied uniformly in all regions of the United States."

The Select Committee's work was crowdeed by events in 1971 and 1972. Sharp Senate and House debates over the emergency school aid program, and numerous attempts to resolve busing issues in the course of handling major education legislation, put many members of the Select Committee in the role of shapers as well as students of policy on equal educational opportunity.

Indeed, many features of the proposals before the subcommittee received their initial formulation during that turbulent period.

In minority views on the Select Committee's Report, I was joined by the senior Senator from Colorado, Mr. Dominick, and the senior Senator from Kentucky, Mr. Cook. Several points which we expressed at the end of 1972, after 2 years of labor on this vexing subject, seem especially pertinent as the subcommittee searches for criteria to guide the district courts in shaping desegregation remedies:

Experience since the 1954 *Brown* decision has taught us that desegregated schools are not by themselves a sufficient precondition for quality education.

It is becoming increasingly clear that the integration of low-achieving black or other minority children with low-achieving whites does not necessarily result in quality education.

It is generally accepted that incentives to truly integrated education of high quality must be provided by the Federal Government, and that standards for truly integrated schools must be applied impartially in all regions of the country. The emergency school aid program (title VII of Public Law 92-318) helps to serve these purposes and can provide valuable guidance to the Nation in resolving the complex and divisive issues which obstruct bringing us together.

Congress will have to weigh the major education decisions handed down by the Supreme Court in 1973 in shaping a strategy and legislation for stable quality integrated education. Should the need remain, in light of these decisions, we favor acceptable legislation seeking the kinds of purposes advanced during 1972 in the administration's proposed Equal Educational Opportunities Act.

Those in the Congress seeking to improve elementary and secondary education in the United States must find ways for the Federal Government to assist financially pressed school districts so that adequate resources will be available and can be effectively used to meet the special educational needs of the poor, the disadvantaged, and the handicapped. It is these approaches which will ultimately result in quality education for all children. Such measures as the involuntary transportation of children to schools many miles from their homes will hamper rather than help progress toward these goals.

In summary, Mr. Chairman, we saw the need to proceed simultaneously on several fronts:

1. Incentives and aids to State and local school districts in the area of compensatory and remedial education. (This subject will receive considerable attention during 1974 in action on major elementary and secondary education legislation.)
2. Learning from our desegregation experiences, and
3. Shaping legislation which would, along with broad compensatory programs, address the need for legislative criteria to guide the fashioning of judicial remedies.

On the question of civil rights enforcement, and thus necessarily the question of judicial remedies, we made the following comments. I believe they suggest the spirit with which the subcommittee should approach the search for legislative criteria:

> Any appraisal of the turbulent history of civil rights enforcement, since the 1954 *Brown* decision, will be affected by convictions concerning the proper and effective use of governmental enforcement to redress specific cases of legally defined discrimination—a use which we strongly uphold, and to moderate abhorrent prejudicial social values and attitudes.
>
> In our judgment, the Nation now suffers in the area of school desegregation from tendencies to invoke governmental enforcement powers—well beyond the proper redressing of legally defined discrimination—for interventions in extremely complex conflicts of social values and attitudes. These conflicts, with deep roots in our national history, are reflected in our emerging pluralistic national culture, and, in the cultures carried to our shores by the many races and peoples who created this still-young Nation.
>
> We believe that, in the troubled area of educational discrimination, clearer distinctions must be made between legal imperatives—subject to measured jus-

tice—and moral imperatives, implicit in concepts of equality. The latter must gain in force through an almost infinite number of individual and group actions—often over many generations—before they enjoy wide acceptance as legal imperatives.

The Congress and all of the people whom it represents need a new sense of realism about the proper balance at this stage in our Nation's history between governmental enforcement in redressing discrimination in the schools, and governmental actions in the field of education aimed at overcoming the disadvantages in skills and achievement which tend to reinforce and perpetuate popular prejudicees against minority and social groups.

During 1973 and into this year, Mr. Chairman, we have witnessed several developments which indicate clearly the dangers and limitations of past judicial tendencies toward racial balancing remedies.

The current energy shortages combined with winter daylight saving time underscore the heavy cost and hazards to health and safety involved in large-scale pupil transportation schemes.

Increased interest in moving from suburbs to cities raises the prospect of having to adjust frequently pupil transportation plans which are based on static assumptions of urban-suburban living patterns.

Legal interventions by local minority citizens contrary to the positions advanced by national civil rights groups, as in Atlanta, Ga., suggest that minority groups will show increasing concern with solid improvements in the quality of education as opposed to the mere appearance of change through pupil transfers and unnecessary redistricting.

Finally, Mr. Chairman, in my home city of Omaha many citizens have been engaged for months in constructive efforts to resolve alleged school discrimination issues. There is a widespread consensus that improvements are necessary regardless of the legalities involved. At the same time, Mr. Chairman, past patterns of judicial decisions and the absence of any criteria to guide judicial remedies have intimidated my constituents' efforts. Their work has proceeded in the face of great uncertainties as to what the courts would accept in the way of a locally prepared plan or specify in the way of a judicial remedy. With clear legislative criteria in hand my constituents would be able to spend far less time speculating about the legal hazards and uncertainties and much more time in addressing substantive questions of improved educational quality. I believe that this is exactly the situation frustrating local elected officials and interested citizens in all metropolitan areas of our Nation. The sooner Congress succeeds in providing clear criteria for judicial action, the sooner we can expect sound progress in improving educational opportunities.

Senator ERVIN. Senator Brock is our first witness. I understand he has come in.

Senator, we will be glad to hear from you at this time. I know you have been a staunch opponent of forced busing of schoolchildren merely for creating a racial balance for a long time and have done some fighting on the floor of the Senate in this cause. We are delighted to have you with us.

TESTIMONY OF HON. BILL BROCK, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator BROCK. I have, Mr. Chairman.

May I first thank you for your decision to hold these hearings on what I consider to be a major issue and a major problem facing this

Nation today. I don't know whether I need to repeat the litany of abuses that have occurred in your State and mine and in the State of the distinguished Senator from Florida and others, abuses of constitutional rights, in my opinion, of all of our children, black and white alike.

As you know, I have introduced Senate Joint Resolution 14, a constitutional amendment to forbid the assignment of children to a particular school on the basis of race, color, or creed. However, it has become painfully obvious that my amendment faces serious obstacles. At best its passage will require a lengthy period of time, during which the abuse will continue should no other action be forthcoming.

It is the need for more immediate redress of this grievance that causes my appearance before you today. This subcommittee has before it four proposals, each of which attempts to deal with the complex problem of achieving equality of opportunity for all children without the imposition of court-ordered busing.

I am not sure I am competent to select one from among the four that would have the greatest immediate relief effect. Rather I find in each some points of merit that I think must be incorporated in our ultimate process to reestablish the constitutional safeguards so necessary for the protection of our children. For example, as in the case of Senator Allen's bill I think it is important that our ultimate measure retain and enhance the neighborhood school concept. Too, it is important that any bill incorporate a provision maximizing personal freedom for the students, allowing him to transfer to a school in which he is a minority should he see personal justification for such a move.

Other proposals would place the question of the equality of opportunity before those who are elected to public office rather then the judiciary. There is no question but what this would make our approach more responsive to the American people. However, I find it difficult to justify a situation which would not have some judicial review and I am not sure that is achievable. Certainly children must have the protection of access to the courts if they are damaged or discriminated against by any political action.

Mr. Chairman, while I cannot come up with a perfect answer to this problem I feel strongly that it is our constitutional responsibility to act. The courts have almost pled with the Congress to establish standards for guaranteeing equal access to educational opportunity for all children, black and white alike; that plea must not be ignored. Busing is wrong. There is no distinction between busing to achieve racial segregation and busing to achieve racial balance. In either instance, we find ourselves far afield from a colorblind application of law. There are ways to safeguard the constitutional rights of our children, to guarantee them equality of opportunity, equality of educational support that must be, and I think it is, the responsibility of the Congress to achieve these goals.

If we can provide our children with good schools in their own neighborhoods where they can learn understanding and brotherhood, rather than hatred bred by coercion, if we can devise a plan which will engender public support rather than jeopardize it, if we can recognize that each child in this country deserves the same treatment and the same opportunity without regard to his race then we will have met that responsibility.

It is now time for the Senate to act, to meet its constitutional mandate.

That concludes my very brief statement, Mr. Chairman. I will be glad to respond to any questions of the committee.

Senator **Ervin**. Well, I have always had a great reluctance to alter the jurisdiction of courts. Nevertheless, the Founding Fathers in article 3 gave Congress this means to put an end to judicial tyranny.

Senator **Brock**. Yes sir; they did.

Senator **Ervin**. It sometimes becomes necessary to curtail the jurisdiction of courts where courts manifest a disregard for the plain provisions of the Constitution. Certainly in the *McCardle* case and in many other cases the Supreme Court itself has sustained the power of the Congress to define the power of the courts.

Now, several years ago Congress passed the Civil Rights Act of 1964, a law defining what is a violation of the Constitution in harmony with the *Brown* case. Congress determined, in effect, that no school board should take into consideration the matter of race in making assignments of children to public schools. It also expressly determined that desegregation did not include the assignment of children to public schools to overcome racial imbalance.

Senator **Brock**. That is right.

Senator **Ervin**. Furthermore, Congress declared in another provision that no officer or court of the United States should in any order require transportation of children to overcome racial imbalance or to achieve racial balance. This was a plain declaration by Congress that busing was outlawed for those purposes.

Now, this act was brought into question before the Supreme Court in the *Swann* case, involving the Charlotte-Mecklenburg School Board in North Carolina. I am very familiar with this case because I filed an amicus curiae brief in that case in the interests of the teachers' association. In that case the Supreme Court came to one of the strangest conclusions that any court anywhere has ever come to. The Chief Justice who wrote the opinion stated directly or by inference 23 times, as I recall it, that the Federal Government had nothing to do with the assignment of children to schools unless there had been racial discrimination by school boards in assignment of students. Having stated that conclusion, the Supreme Court said that when Congress adopted the provision of the Civil Rights Act prohibiting busing that Congress was attempting to regulate, not something it had the power under the Constitution to regulate, but something it had no power under the Constitution to regulate, namely de facto segregation. This statement is an insult to the intelligence of the Congress. The Court's determination that Congress would attempt to legislate in respect to a matter over which it had no power to regulate rather than in respect to a matter over which it did have power to regulate is one of the most remarkable opinions since *Dred Scott*. The decision of the Court was that it was necessary to bus thousands of children out of northwest Charlotte in order to change the racial complexion of the schools.

In effect, that was a finding of fact that the segregation was largely the result of de facto, residential segregation. The district court judge said that the ultimate objective was to assign children to schools in racial proportions according to their proportion of the whole body politic in Mecklenburg County. The Supreme Court said that if the judge had ordered a quota system it would have been unconstitutional. Nevertheless, after saying that, the Supreme Court made the statement that to assign children to schools on the basis of the racial proportion of the area affected was a good starting point.

I have stated in my brief, and I think it is absolutely correct, that the decision in the *Swann* case is contrary to literally hundreds and hundreds of decisions construing the equal protection clause of the 14th amendment to the Constitution. They held in the *Brown* case, as you know, that it is unconstitutional under the equal protection clause to deny children the right to attend a particular school on account of race. The Supreme Court came full circle by the time it decided the *Swann* case and held that the Constitution required the assignment of children to schools on the basis of race.

The equal protection clause is one of the simplest provisions in the Constitution. It provides that no State shall deny any person in the jurisdiction of equal protection of the laws. That is a very laudable principle. It means, in effect, that no State shall have one law for one person and another law for another person in like circumstances, or one law for one group of people and another law for another group of people in like circumstances.

The interpretation, until the decision in the *Swann* case, was that a State was forbidden by the equal protection clause to treat persons similarly situated in a different manner. And yet, the *Swann* case required the school board to treat persons similarly situated in a different manner in violation of the words of the equal protection clause and in violation of decisions interpreting this clause. It said that the school board must divide the children and determine their assignment to schools in two groups.

The first group of children could be permitted by the school board to attend their neighborhood schools. The second group could not be permitted by the school board to attend their neighborhood schools. That is a clear violation of the equal protection clause because it treated children similarly situated in a different manner. That is a violation of the equal protection clause.

Then, the Supreme Court determined that the reason the school board cannot let the second group of children attend their neighborhood schools is because they must be transported to schools elsewhere either to decrease the number of children of their race in the neighborhood schools or to increase the number of children of their race in schools elsewhere. Oceans and oceans of judicial sophistry cannot wash out the plain fact that this is denying the children who have been attending the neighborhood schools and who are required to be bused admission to schools solely on the basis of their race. This is exactly what the Supreme Court held in the *Brown* case to be unconstitutional

Senator BROCK. That is right.

Senator ERVIN. So I think that I justify denying courts jurisdiction where the courts are manifesting disregard for the Constitution. The Constitution is the only protection the American people have against judicial tyranny.

Senator BROCK. Senator, I resent just as much as you do the gymnastics used to rationalize the process, and I don't disagree with your premise.

One of the things that is interesting to me is the fact that the courts continue to do this even in light of the experiences which showed the fallacy of their own ways. I know of no busing decision which hasn't resulted in greater segregation than the case before busing was approved. It has engendered white flight, and reduced support of our public school system. They cannot survive without the support of the parents and the teachers and the children. That is why I think it is important that the Congress establish standards to protect these children, black and white alike.

Senator **Ervin**. Senator Gurney.

Senator **Gurney**. I want to commend the Senator from Tennessee for his statement. I know he has had the same problems in his State as both the Senator from North Carolina and I have had. I am glad to see he has taken an active interest in it.

I want to congratulate him on his comments this morning as well as the very fine arguments.

Just to add one thing, I think it is very interesting that when we had segregation in schools, and everyone agrees that that was the wrong thing to do, those who tried to change segregation were roundly condemning busing because black children were being bused past schools. Now for the same reason these same people have been able to retain their reasoning by saying it is all right to bus children past their same schools in order to attain some political sentiment that is furthering education, and I must say, I can't understand their reasoning at all.

Senator **Brock**. Neither can I.

Senator **Ervin**. Thank you very much.

The next witness is Senator William L. Scott of Virginia. The State of Virginia has also had problems with respect to this matter. The Federal district court judge required the consolidation of the school districts of Richmond and two adjoining counties even though these jurisdictions were established long before anybody ever heard of the equal protection clause and before this country was unhappily set asunder by the Civil War. These county lines and city lines were drawn many years ago without regard to residential separation of the races. Fortunately, the circuit court of appeals reversed the district court and the Supreme Court did not overrule the circuit court.

TESTIMONY OF HON. WILLIAM L. SCOTT, A U.S. SENATOR FROM THE COMMONWEALTH OF VIRGINIA

Senator **Scott**. After listening to the comments of the chairman, my remarks may be superfluous, but let me commend you for holding these hearings. In my opinion, the busing of children to attain a racial balance continues to concern people throughout the country, and the energy crisis has added a new ingredient.

In a poll I took within my former congressional district of Virginia a few years ago we asked the question: "Do you favor busing of schoolchildren to obtain racial balance under any circumstances?" This was sent to every home in the district, the largest district in Virginia, in March of 1972, and of the more than 50,000 families who responded, only 7 percent favored busing, 91 percent indicated their opposition, and 2 percent expressed no opinion. The results of all polls in recent years indicate that the people from all parts of the country are overwhelmingly opposed to racial busing. A Lou Harris poll conducted nationwide in 1972 disclosed that 73 percent of the parents polled oppose busing. In a more recent Gallup poll, September 1973, it was reported that few people—black or white—think that busing is the best way to achieve racial integration of our schools, only 5 percent of the people in that survey—9 percent of the blacks and 4 percent of the whites—chose busing children from one district to another rather than several other alternatives.

According to the survey findings, most people considered racial busing an infringement of personal liberties; were worried about busing children to schools in different neighborhoods; and were concerned that busing would increase local school taxes. Very little opposition was based on race.

The General Assembly of Virginia last year adopted a joint resolution petitioning the Congress to call a convention for the purpose of amending the Constitution to eliminate racial busing. While I do not press the convention course in proposing a constitutional amendment, this issue must be resolved one way or another. If we believe that the ultimate will or sovereignty resides in the people of our country collectively, I feel we are obligated to respond to this collective will and to eliminate racial busing. Therefore, I hope that a measure to prohibit busing of schoolchildren to attain a racial balance will be favorably reported by this committee so that all Senators will have an opportunity to vote on this most important matter.

Mr. Chairman, when people are considering the purchase of a home to raise their families, they consider the location of schools, churches, and shopping centers as well as the general neighborhood. Children make friends within this neighborhood, and it seems reasonable for them to attend school with their friends. We could say that when parents buy a home they purchase an environment within which to raise their families. When children are taken from their neighborhood into strange areas, emotional problems and hostility may develop. Children also may be less alert on arriving at their destinations and have less time during the day to devote to the learning process. It seems reasonable to concentrate on quality education for children rather than attempt to use them as pawns to solve social problems for which they have no degree of responsibility.

In Virginia we have had a number of court cases regarding busing. The most widely publicized one, the one the chairman referred to, involved schools in the Richmond area. The Federal district court ordered the cross-busing of children from the independent city of Richmond into the adjoining counties of Chesterfield and Henrico, and the busing of children from the two counties into the city. The court directed that a new school board be constituted from the three political subdivisions to administer a joint school system. Frankly, I am unaware of any basis in law for a court attempting to eliminate political subdivision lines established by the State legislature. The fourth circuit court of appeals apparently agreed in reversing the trial court. The Supreme Court, as you know, divided four to four thus upholding the court of appeals and preserving the independence of the local school board in the Richmond area.

One of the justices of Virginia who had been chairman of the Richmond City School Board abstained from voting in this case.

While I favor a constitutional amendment to prevent the busing of children to obtain a racial balance, it may be difficult to obtain the necessary two-thirds vote in each body of the Congress and I am glad the committee is considering alternate proposals.

As you know, Mr. Chairman, the Constitution provides that in addition to the Supreme Court, judicial power "shall be vested * * * in such inferior courts as the Congress may from time to time ordain and establish." This is the concept in my own bill S. 287 introduced on January 11, 1973, and referred to your committee. Its intention is to clarify the jurisdiction of Federal courts with regard to cases and controversies involving the public schools. It provides neither the Federal district courts nor the circuit courts of appeal shall have any jurisdiction to hear or decide cases and controversies involving the public schools, but that jurisdiction with respect to such cases and controversies shall be vested in the courts of general jurisdiction of the respective States with the right of appeal to the highest State courts and by certiorari to the Supreme Court of the United States; thereby retaining Federal supremacy.

Mr. Chairman, you referred to the *Charlotte-Mecklenburg* case. I have read this case and it is somewhat vague, but it is my understanding from a reading of the case, and you are much more familiar with it, of course, rising from your own State, but it gives great discretion to the trial judge, to the district court judge, and I think that even though under my bill there would be Federal supremacy retained by writ of certiorari to the Supreme Court, the major decisions would be made in the State courts, the trial courts within that State.

Mr. Chairman, the purpose of this bill is to insure that cases dealing with such a vital local issue as neighborhood schools be heard by judges attuned to the problems and the needs of our communities.

There is no doubt of the power of the Congress to enact such legislation, and not only to set up a Federal judicial system below the Supreme Court, but also to fix the jurisdiction of such courts.

The first Congress exercised the power granted by the Constitution when it enacted the Judiciary Act of 1789 (1 Stat. 73). However, it did not grant to the Federal courts the full judicial power of the United States. Jurisdictional amount requirements kept many litigants from Federal courts and sent them instead to State courts to adjudicate Federal claims. The 1789 act contained no grant of "Federal question" jurisdiction, so that suits arising, in the words of article III, section 2, "under this Constitution, the laws of the United States, and treaties * * *," except where otherwise specifically and narrowly provided for, were required to be brought in the State courts until 1876 (18 Stat. 479). A clause barring diversity jurisdiction, where diversity had been created by the assignment of choices in action, kept in State courts cases which the Constitution would have permitted Congress to assign to Federal courts.

In a case involving the "Assignee Clause," the Supreme Court first announced the doctrine that Congress controlled much of its jurisdiction and all of that of the lower Federal courts. In the words of Justice Chase:

> The notion has frequently been entertained, that the Federal courts derive their judicial power immediately from the Constitution, but the political truth is, that the disposal of the judicial power, except in a few specified instances, belongs to Congress. If Congress has given the power to this court, we possess it, not otherwise; and if Congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, Congress is not bound,

> and it would, perhaps, be inexpedient to enlarge the jurisdiction of the Federal courts to every subject, in every form, which the Constitution might warrant.

I cite cases from time to time in my prepared remarks, and I would ask they be included without reading the citations of authority. (*Turner* v. *Bank of North America*, 4 Dall. (4 U.S.) 8, 10 (1799), *Cary* v. *Curtis*, 3 How. (44 U.S.) 236, 245 (1845).) And in the *Cary* v. *Curtis*, 3 How. 44 (U.S.) 236, 245 (1845) it was said that:

> The judicial power of the United States, although it has its origins in the Constitution is (except in enumerated stances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.

For similar expressions, Mr. Chairman, I cite a number of other cases. *Sheldon* v. *Sill*, 3 How. (49 U.S.) 441 (1850); *Plaquemines Tropical Fruit Co.* v. *Henderson*, 170 U.S. 511 (1898); *Kline* v. *Burke Construction Co.*, 260 U.S. 226 (1922); *Lockerty* v. *Phillips*, 319 U.S. 182 (1943); *South Carolina* v. *Katzenback*, 383 U.S. 301, 331–332 (1966).

State judges under the supremacy clause, article VI, clause 2, are bound by oath to uphold the supremacy of the Constitution, as well as constitutional Federal laws and treaties. Today, all cases which might be brought under "Federal question" and "diversity" jurisdiction in Federal courts which do not involve the requisite jurisdictional amount, must be brought in State courts. Litigants may on their own bring most cases in State courts which could be brought in Federal courts, excepting only a few classes of cases in which Congress has made Federal jurisdiction exclusive.

Mr. Chairman, my bill does not go to the question of the restriction of the appellate jurisdiction of the Supreme Court, which may be the subject of a difference of opinion because the U.S. Supreme Court would still be the court of last resort, even though cases and controversies involving the public schools would be decided initially in State courts.

The reason for emphasizing this bill, S. 287, Mr. Chairman, is because other witnesses undoubtedly will testify with regard to other bills such as your own, S. 1737, to prohibit busing of schoolchildren. I am in agreement with this bill but am in doubt as to its fate in Federal courts. It will not solve the problem of Federal judges ruling in cases that are more properly matters for State judicial action. Transferring jurisdiction over issues and controversies involving the public schools from the Federal to the State courts can be accomplished by a simple majority of the Congress. There is no doubt that the people of the country want the neighborhood schools preserved, and in my opinion, they want Federal authorities prevented from issuing edicts which affect the education of their children.

If we are interested in the welfare of children, and I am sure this is true of each member of the committee; if we want them to receive the highest quality education, and again, I know this is the desire of all of us; then we must find a solution to this problem. Therefore, I urge that the committee bring a proposal to the floor for consideration while we have sufficient time for Congress to work its will and enact the necessary legislation during this Congress to resolve this most important domestic problem.

Again, Mr. Chairman and members of the subcommittee, I appreciate your holding these hearings and the opportunity to present my views.

Senator **Ervin**. I wish to commend the clearness and thoroughness of your statement. Your bill is certainly constitutional, and it ought not to arouse the opposition of those who are reluctant to curtail the ultimate jurisdiction of the courts.

As a matter of fact, as you point out, the Federal courts are denied jurisdiction in respect to the overwhelming majority of all the cases and controversies arising under the Constitution, the laws and treaties of the United States. This is done by the simple statutory provision that no matter arising under the Constitution or a right created by the Congress shall be adjudicated in the Federal courts unless the sum or value exceeds $10,000. Therefore, the overwhelming majority of cases now arising under the Constitution and laws and treaties of the United States are limited by an act of Congress to adjudication solely to State courts with the right of appeal ultimately to the Supreme Court, as your bill provides.

Senator **Scott**. Well, Mr. Chairman, before even preparing this bill, and I introduced a similar measure in the House when I was a Member of that body, I did have the Library of Congress research the matter for me to determine just whether we could act in this case, and of course, they came up with an affirmative answer. It was interesting last night while I was at home; I reviewed the Constitution annotated and reviewed the cases that are cited, and there is no question in my mind as to the power of the Congress by just a majority of the vote to do something of this nature if they chose to do so, and I hope we do.

Senator **Ervin**. Senator Gurney.

Senator **Gurney**. I certainly commend the distinguished Senator of Virginia for his contribution here. I think his approach has a great deal of merit.

As a general rule, Federal courts have been reserved for deciding questions of law that are Federal matters, and State courts, of course, for matters peculiarly within the jurisdiction of the State. I can't think of anything that is more local than the problems of the schools throughout the United States. They may be run by counties—that is true in my own State and I guess in many States in the Nation. And there are some where they are run by cities and not even counties.

When we got into this problem of busing, the schools were really neighborhood problems, and the PTA's were formed from neighbors who lived in the communities where the children went to school.

So I think this problem is a local matter, for a State court, and I commend the Senator for his approach in this bill.

Senator **Ervin**. Thank you very much.

The next witness is Congressman Robert J. Huber, Representative from the 18th Congressional District of Michigan.

We welcome you to the committee and commend you for your interest in this matter which certainly affects your State as it affects virtually every other State in the Union at this time.

TESTIMONY OF HON. ROBERT J. HUBER, A REPRESENTATIVE IN THE U.S. CONGRESS FROM THE STATE OF MICHIGAN

Mr. HUBER. Thank you, Senator.

I wish to thank Senator Ervin's committee for the opportunity to testify here today, and commend the committee for holding hearings on the controversial issue of busing, and hope that some good will result from it.

The real issue behind the busing furor is not, as some of its advocates would have us believe, busing per se. The issue at hand is actually who is going to control the education of the child, the parents or the State? And if you think this is farfetched, let me assure you that it is not. Last year, the U.S. Civil Rights Commission put out a booklet entitled "Your Child and Busing." In the pamphlet, the Commission goes to some lengths to reassure parents that forced busing is actually benefical to their children and that any fears the parents have are misguided. One of the arguments made in favor of forced busing is: "Clearly, parents cannot on their own make the final decision about where to send their children for public schooling."

Now, I, for one, do not find it particularly reassuring to know that one Government agency doesn't think the American parent has the native intelligence to decide what is in their own child's best interest. It is precisely this elitist and condescending attitude by the Federal Government that has brought about the current widespread hostility and distrust of the U.S. Congress, and all government in general. If we are to regain the public's confidence we must do all that we can to return as much power as possible to the people. And one giant step forward would be for Congress to propose a constitutional amendment that would put an end to this travesty of forced busing.

I would hope that most Members of Congress are aware of the Gallup poll released last September (1973). In that poll, it was shown that 95 percent of the American public opposes forced busing for racial balance. Additionally, the President and countless Members of Congress have taken a stand against forced busing. So the question remains, why do we still have forced busing? I cannot answer, but I do know that I am extremely disappointed that the executive branch has not given much more than lip service to the problem. Mr. Lincoln one time said he had a case of the "slows." And I am also disappointed that the two bodies of Congress cannot seem to reach any mutual agreement on this subject. The result of this reluctance is that more and more courts are usurping our authority as legislators and thus breaking down our constitutional separation of powers.

It is a further tragedy that these courts are acting in a manner that is directly contrary to the law of the land. The Civil Rights Act of 1964 says that " 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." It further states that—

> * * * nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve racial balance.

Obviously, the courts are clearly ignoring the intent of Congress with respect to the forced transportation of students. And yet, we refuse to act. I am, however, greatly encouraged by this committee's decision to hold hearings on this matter. It gives me hope that this Congress may yet take some action to resolve the forced busing controversy.

There is only one action, though, that can put an end to this chaos, and that is for the Congress to vote out a proposed constitutional amendment that would have the effect of banning forced busing. This is the best and most feasible method of stopping the Court's constant subversion of our intent with respect to the busing issue.

Many of those who promote forced busing say they are doing so in order to insure that students are receiving "equal educational opportunities" because everyone is entitled, under the 14th amendment, to "equal protection of the law." This thinking ignores a 1973 ruling by the Supreme Court wherein they stated, "education is not within the limited category of rights recognized by this Court as guaranteed by the Constitution." If that is the case, then I sincerely believe that new laws abolishing forced busing could be passed by the Congress and found constitutional by the courts. Nevertheless, there is some risk in that approach for it has become exceedingly difficult to judge just exactly what the courts are going to hold constitutional. The safest route is, obviously, the constitutional amendment.

Further, many sociologists argued that giving minorities the same "equal educational opportunities" as others would improve the minority's learning skills and improve their educational achievements. There are two problems with this type of thinking. First, saying that members of a minority race can only benefit by associating with members of a majority race is blatantly racist and I do not condone such thinking. Of course I do recognize that many of these sociologists are sincerely trying to promote a common "good" rather than foster further racial antagonisms. What people often overlook in our society is that there is often more evil done in the name of good than one imagines. In other words, the ends justify the means—a philosophy to which I do not subscribe—for there is no justification, ever, to imposing something that is wrong in order to achieve what one thinks is a worthwhile goal.

The second problem with the sociologists' and the courts' thinking is their absolute refusal to look at the results now that we have had several years of busing in some areas. I think it is worth noting what has happened in these communities. Jeffery J. Leech, writing in volume 6, No. 4 (1973) of the Indiana Law Review, points out that—

> In every city studied, busing failed to reduce the gap between black and white achievement. In fact, most cities reported that the achievement gap had grown even larger after busing. Scholars who have reviewed the evidence, including Armor, Bell, Edmonds, Glazer, and St. John, have concluded that busing has little, if any, effect on the academic achievement of either black or white children. Thus, the most recent sociological evidence fails to confirm a basic premise underlying the rationale for court ordered busing; i.e., that it will positively affect the academic performance of the minority children.

So, since the hoped-for goals of forced busing have not been achieved, I cannot comprehend why some persist in clinging to the myth that forced busing of students will bring about an "equal education."

The noted professor of education and social structure at Harvard, Nathan Glazer, hit the nail on the head when he wrote in an article entitled, "Is Busing Necessary?":

The crucial point is: do Federal courts have the right to impose a school policy that would deprive local communities and groups, white and black, of power over their schools?

And the truth of the matter is that there is, via court-imposed forced busing, a dangerous trend toward taking more and more power away from the people and centralizing it in the ever burgeoning bureaucracy. The tragedy of the situation is that we, the Congress, will now have to amend the Constitution to insure that the people retain their constitutional rights.

Mr. Chairman, I flew in this morning from Detroit. I brought along with me a copy of a news article which I would like to put in the record. The article discusses a problem we have in my district involving the Ferndale School District. It covers an investigation that was made in the Ferndale School District by HEW. If there ever was a travesty of justice it was what HEW did in that school district study. They waited to hold the trial before they hung the suspected person. I am sorry I didn't have a chance to make copies of this for distribution, but I just got in, as I said, at 9:30 this morning. I would hope that possibly you or your committee might consider the possibility of sending somebody out to the Ferndale School District to study what they did in that particular area and study how the rights of our citizens have been so grossly misused on the part of investigators who conducted the greatest witch hunt I have ever seen. I don't happen to be a lawyer, but I am certain they violated all the canons of evidence and trials in order to arrive at the conclusion they had in their minds before they came out there. I would hope this committee might send somebody out there to take a look at that situation and see what has happened to that Ferndale School District.

I suggested to Congressman Perkins that he do this. It is very difficult for us to get him out to Ferndale, and I feel somebody on this committee would be able to go out and take a look at that situation

In testimony before the Education and Labor Committee, some of which I put into the record—well, it really wasn't testimony—it was actually some of the comments of Dr. Porter who is Michigan's superintendent of education. He appeared before the Education and Labor Committee. But following his testimony I sat down with him and we talked about the problem of the course of each child, and he told us that some of the studies that they have been doing in Michigan show that the problem of the child revolves around mobility and attendance. The turnover is somewhere, on an average, between 65 and 75 percent. Sometimes the whole classroom turns over. The teachers can't teach and the pupils can't learn. The kids don't come to school regularly.

Dr. Porter has been running a test in which he has got the parents, teachers, the principal, and the child to work together on handling these two problems, and when they do the child can advance two grades in 1 year if he is there every day and if his parents don't move him from one school to another. That has nothing to do with buses or tires or gasoline. It is just being there every day and not changing from one school to another. This seems to me to be so fundamental in this busing problem and I am sorry it hasn't been given greater weight.

So I would hope, Mr. Chairman, that possibly somebody from your committee will come out there to Ferndale. I would be delighted to meet them and let them know HEW violates the rights of our citizens under what they call some attempt to render justice in the educational field.

Again, Mr. Chairman, I appreciate the time that you have given me to make this presentation and I certainly hope your committee will move as rapidly as possible toward coming up with some logical answers to a very bad situation.

Thank you, Mr. Chairman.

Senator ERVIN. Thank you.

I tried to deal with the situation you mentioned in S. 1737. This bill recognizes the decision in the *Brown* case of 1954 that the Constitution is violated when any child is denied admission to a school on account of the child's race. It provides certain protection where a school board provides a "freedom of choice" system and allows parents of children to select which schools their children will attend. There are a great many prohibitions on the exercises of tyrannical powers by HEW as well as the courts where "freedom of choice" is established. One section of my bill, on page 3, provides that no department, agency, or officer or employee of the United States who is empowered to extend Federal financial assistance to any program or activity at any public school by way of grant, loan, or otherwise, shall withhold or threaten to withhold any such Federal financial assistance from any such program or activity at such public school, to coerce or induce the school board operating such public school to transport students from any such public school to any other public school for the purpose of altering in any way the racial composition of the student body at such public school or any other public school.

You alluded in your statement to the civil rights title IV of the Civil Rights Act of 1964. Clause 1 of the 14th amendment contains the equal protection of the law clause. The fifth section of the 14th amendment says that Congress shall have the power to enact legislation to enforce the provisions of this article, including the equal protection of law clause. So in 1954, in title IV of the Civil Rights Act, Congress undertook to define this constitutional power. It defined "desegregation" of public education in compliance with the equal protection clause. Section 401(b) defines "desegregation." It says "desegregation means the assignment of students to public schools or within such public schools without regard to their race, color, religion, or national origin." In other words, it says in about as plain words as can be found in the English language that in assigning children to public schools a school board would ignore matters of race, color, religion, or national origin. It could not have found simpler words to express that concept. Yet, in the *Swann* case the Supreme Court ignored that definition and said in effect that "desegregation" requires that school boards should take into consideration matters of race, color, religion, and national origin in making assignments.

In other words, the Supreme Court absolutely ignored the power of Congress to pass laws to enforce the 14th amendment. But then, the Congress decided to take no chances with the courts, so it put in something else that even a judge ought to be able to understand. It not only defined "desegregation," affirmatively, but also defined what "desegregation" is not. It said in the same section of section 401 of title IV of the Civil Rights Act of 1964, "but desegregation shall not mean the assignment of students to public schools in order to overcome racial imbalance." Notwithstanding the constitutional power of Congress to deal with this matter and notwithstanding the fact that Congress did deal with it, the Supreme Court adopted exactly the opposite interpretation of the meaning of the word "desegregation." It said, in effect, in the *Swann* case that "desegregation" shall mean the assignment of students to public schools in order to overcome racial imbalance.

The same title, section 407(a)(2), as you point out, said this: "Nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils in order to achieve such racial balance." Now, there was a direct prohibition upon busing to achieve racial balance or to overcome racial imbalance. There is not a word in this whole title that indicates any intention of Congress to regulate "de facto segregation" that is based upon residence. Yet, the Supreme Court nullified this act of Congress by holding that Congress was a bunch of legislative fools and that Congress had attempted to regulate "de facto segregation" instead of "de jure segregation."

It did another thing that I resented as a southerner. It said there was a presumption against States of the South which had maintained school segregation when the Supreme Court itself held that school segregation was permissible provided the facilities were equal. In effect, the Supreme Court held that there was an adverse presumption against Southern States because they didn't have sufficient intelligence to anticipate the Supreme Court itself in the discovery that the "separate but equal" doctrine had ceased to be the law of the land. In other words, Southern States were required to know more about the Constitution and what the future Supreme Court justices would hold the Constitution meant than the Supreme Court itself. Since these States did not anticipate a change of opinion of the Supreme Court they would have an adverse presumption raised against them just because they were no wiser than the Supreme Court and just as ignorant as the Supreme Court on the point.

Mr. HUBER. Senator, you know, in this *Ferndale* case it is very interesting—I have one solid black district called Royal Township. Half is in Ferndale School District and the other in Park Grove School District. They decided they would bus them several years back. The black mothers in the Royal Township area refused to let those buses roll and they were the ones that stopped the buses themselves. In the Ferndale School District where the other segment of the Royal Township is there has never been any problem, they have been totally integrated for years and yet HEW came in there and did such great disservice to our community. I certainly hope you will have a chance to read this little report which you will have some copies of as soon as I can——

Senator ERVIN. The committee will have it duplicated and I will ask the committee to send the original back to you after we duplicate it and put it in the record.

[The above referred to report follows:]

[From the Legal Advertiser and Ferndale Gazette-Times, Oct. 8, 1970]

PERHAPS WE SHOULD TAKE A COWARD'S WAY OUT

(By Mary Klemanski)

It is still possible to fight City Hall. But fighting a National Government determined to "make an example" of a specific northern school system looks like a doomed—and crippling battle.

It has been more than a week since we received word that Federal Examiner Horace Robbins found the School District of the City of Ferndale guilty of racial discrimination—in violation of the Civil Rights Act of 1964, Title VI.

Bluntly, the School Board was ordered to desegregate Grant School's all black pupil population.

Actually, both the junior and senior high schools have always been integrated; and several elementary schools are integrated, where neighborhoods are integrated.

To members of the community who consistently attended hearings, the adverse disposition came as no surprise. It seemed to many of us that the Government of the United States of America—through its Department of Health, Education and Welfare—had condescended to grant us the mechanics of a hearing, immediately prior to finding us guilty.

Like the western sheriff, HEW assured Ferndale Schools we would not be hanged until after the trial.

The approach used during testimony was a "scattergun" method of hitting the entire community with as many accusations as possible. Apparently, Chief HEW attorneys Roderick Potter and Edward P. Levy hoped at least some accusations would remain in the record.

Final briefs on the hearings, totaled 57 pages—mute testimony to the success of this scattergun attack. Included in the record were such matters as zoning practices in the cities of Oak Park and Ferndale; restrictive convenants in land titles; and land annexation by the City of Ferndale from Royal Oak Township (the Ethyl Corporation property on Eight Mile and Pinecrest). Perhaps HEW's contention that these things point to a "Pattern of discrimination" is true. It is generally agreed that there was some discrimination 40 years ago. There still is—on both sides.

However, the main body of HEW testimony regarded civic matters over which members of the School Board—past or present—had no control. It was, and is, irrelevant to the issue. Yet, it stands in the record.

School Board Attorney Burton R. Shifman—an able lawyer, engaged in a battle with as many as seven government counselors during the course of a day—repeatedly reminded them it was HEW's job to prove its allegations.

"I'm making these charges," Potter once said. "You will have your chance to prove the district is innocent—if you can."

"This," exploded Shifman, "is still the United States of America. The district is to be presumed innocent unless you can prove it guilty."

Several times Examiner Robbins said he would allow the HEW some "latitude." He would make a determination later as to whether or not the testimony would be allowed to remain in the record.

But when Robbins seemed bent on allowing testimony on the basis of a witness' list of reading matter, Shifman blew his cool Potter admitted the social science "expert" was going to give his opinion about racial bias, as derived from his reading sources.

"This is not only latitude," Shifman stormed—"but longitude as well—encompassing the boundaries of the entire United States of America, and based on this man's opinion. The School District of the City of Ferndale has been charged. Can we not confine our testimony to the activities in that area?

"The goddess of justice is blind," he expounded. "When we allow the opinions of many to be entered in evidence as fact, then her blindfold is removed. I am interested in the truth. Truth is fact—not opinion.

The testimony of Mrs. Anna Eaton Thomas, who had stated she never objected to Royal Oak Township children attending Jefferson School was refuted with documentation.

Shifman produced a Circuit Court document asking for an injunction to prevent the 1925 School Board from sending Royal Oak Township children to Jefferson School, "which * * * is at least one and one half miles from * * * the homes of (the) petitioners," Mrs. Thomas complained.

Circuit Court Judge Glenn C. Gillespie dismissed the suit, but the point is, Mrs. Thomas, and others in the Township expressed dissatisfaction with Jefferson School, and asked their children either be sent to Ridgewood School (vastly overcrowded) or for construction of a school of their own in the Township. Yet, her testimony was that Township residents resented the construction of Grant School. Shifman's request to have her testimony stricken from the record was denied.

So it went.

It would be pointless—and false—to deny that bias existed 40 years ago. The United States of America—and hopefully, Ferndale is still part of it—is the only nation in the world's history that has attempted to encompass every race, religion, and culture in one unit. It is a monumental experiment in human understanding, and hasn't always succeeded. It may yet fail. Racial bias—and all bias—is something we must fight, constantly.

At this point, Mrs. John Hambrick is suggesting a vote of the electorate to determine a means of integration of all schools. She may be right. We may have to comply with HEW orders to integrate Grant School—even though we know it won't improve education, nor race relations.

It may seem like the cowardly way out—but how long is this small School District supposed to fight the kind of power we have seen brought to bear against it?

Senator ERVIN. I certainly appreciate the view that parents ought to have some voice where their children are educated. In fact, the Supreme Court has acknowledged this is one of its decisions.

Senator Gurney.

Senator GURNEY. I want to commend you on a very excellent statement.

I won't comment on the legalities of this statement. Although, of course the committee and subcommittee will have to come to grips with that when we report out legislation and hopefully pass it on the Senate floor, but I do want to commend you on the practicalities you have brought out as far as busing is concerned.

You have made your case of chaos which has developed in your own situation. I know in various school systems we have in Florida it is chaotic.

The one thing it seems to me that the HEW people, the social engineers who knew so much about this busing have totally forgotten, and that is the welfare of the very people that they pretend to try to help, the students themselves, because this is, as you have noted and seen it in your own school districts, their actions have completely thwarted education and our children are not getting any education at all.

So thank you for bringing to our attention the practicalities of the problems, especially as it affects your own district.

Mr. HUBER. The subject of mobility and attendance being one of the key problems. Incidentally, Dr. Porter is a black man. I thought you might like to know that.

Senator ERVIN. Just one minute. I was critical of the Supreme Court decision in the *Swann* Case. Some of my friends say I ought to have respect for Supreme Court decisions. I used to be a judge and am now a legislator. I know that judges and legislators are both very fallible men and as prone to errors as anybody. I have respect for judicial decisions if they are constitutionally and intellectually respectful, otherwise not.

Mr. HUBER. Mr. Senator, the case on the 27th before the Supreme Court and Bill Saxton, who is the lawyer who will be handling that case, is delighted you are having your hearings. We are going to start a discharge petition in the House because we believe the Supreme Court will be fully aware through your efforts and the Senate's efforts that the people——

Senator ERVIN. I might add my attitude is in complete harmony with what Chief Justice Harlan Stone said. He said that the only protection we have against judicial error, and even judicial usurpation is careful scrutiny of the judicial decisions and fearless comment upon them.

Mr. HUBER. Thank you, sir.

Senator MATHIAS. Mr. Chairman, I wonder if I could interject one question?

Senator ERVIN. Yes, sir.

Senator MATHIAS. How big are the average schools in your district, Congressman?

Mr. HUBER. They run a tremendous gamut because, for instance, the Detroit school is now broken down to subdistricts. Anyone of those subdistricts is larger than any district in the State. We have some 50-odd districts that are involved in this case.

Senator MATHIAS. Would you say the larger of the schools could qualify as neighborhood schools?

Mr. HUBER. Well, with the exception of the Detroit school district, I think that is true. I think the school districts themselves with the exception of the Detroit district consider themselves neighborhood schools.

Senator MATHIAS. In other words, students could walk to school in most of the schools except for Detroit?

Mr. HUBER. As we fan out from Detroit where the areas increase in size because of the urban sprawl and as you get further and further away this is so. But in the Ferndale district they don't have a single bus in the district except for some retarded or special children.

Senator MATHIAS. Would you advocate a national program encouraging more and smaller schools in neighborhoods that be truly neighborhood schools so that busing can be eliminated, not only for questions of racial balance, but for any reason?

Mr. HUBER. If we could teach reading, writing, and arithmetic I would be all for it. I would like to see our graduates from the school system be able to read and write and add and subtract, and so many of them can't now with all this advanced technology we have developed over the years. I think the smaller schools might have a lot of advantages.

Senator MATHIAS. Thank you.

Thank you, Mr. Chairman.

Senator ERVIN. I would also like to point out that I have another great American on my side whose birthday we were celebrating last week. That is Abraham Lincoln. In speaking of the *Dred Scott* decision, Lincoln said, in substance, that it was erroneous and contrary to such precedence that we had on the subject. He refused to accept it as a guide for Government or the people, and declared that he would do everything within his power to secure its reversal.

Mr. HUBER. Thank you, sir.

Senator ERVIN. Thank you very much.

Our next witness is Dr. John Schade, a member of the School District of Rockford, Ill.

I want to express our appreciation that you came here today to appear on very short notice.

TESTIMONY OF DR. JOHN SCHADE, SCHOOL BOARD MEMBER, ROCKFORD, ILL.

Dr. SCHADE. Thank you, Senator and committee and people of the public who showed up at these hearings.

I was aked to write out my comments, and I did do so. I have a sense of humor and certainly to laugh with a sense of humor eases the load. However, these are not all my notes, thank God. However, they do happen to be the petition presented to Hon. Daniel Walker, Governor of Illinois. I would just read the top of the petition, 15,000 names from the city of Rockford. It says:

> We, the undersigned, respectfully submit this petition expressing our objection to forced busing or redistributing of schoolchildren to accomplish equalization of achievement, social or racial desegregation or for any other reason. We feel that equal opportunity for quality education should be achieved by other methods. We would support any legislation to ban forced busing. As taxpayers we expect the elected officials to protect the rights of our schoolchildren to attend their neighborhood school.

I want to be sure I presented this evidence, and this is the only copy I have, but if you would like it you can have it on receipt, otherwise I would take it back.

Senator Ervin. We would hate to take all those documents. How many signatures?

Dr. Schade. I would need a truck——

Senator Ervin. We would like to have the words of the petition. If we can have them duplicated, we will return the original to you.

Mr. Schade. Fine.

Senator Ervin. Then, let the record show that Dr. Schade presents exhibits before the committee, petitions addressed to the Governor of Illinois, which is included in the record, signed by 15,000 citizens of Rockford, Ill., schools.

Dr. Schade. Fine.

I was called upon yesterday at 2 to leave by 6 o'clock and be here this morning. I am extremely grateful for the opportunity. I have fought forced busing for 5 solid years in Rockford and successfully until recently.

I have prepared a 4-page statement and it won't take too long, but that is to be somewhat of a story-type thing because I had to write it out during the night.

I finished at 5:30 this morning. I will sit down and read this for you. We have copies given to the committee members.

The subject is forced busing to achieve racial balance in our schools.

Representing Concerned Parent Group of 15,000 opposed to forced busing: W. John Schade, Jr., 3611 Larson Avenue, Rockford, Ill. Five-year member and past president, Rockford Board of Education, District 205, Rockford, Ill., acting as an individual and on request. This is important that some may construe I am acting on behalf of the board of education.

I am a citizen of Rockford since October 1958, a father of 11 children ages 31 to 11 years, six girls, five boys, also grandfather of eight, so definitely interested in education, for all other children, too, also am a licensed practicing chiropractor in Illinois since 1946.

Rockford is the second largest school district in Illinois with 40,618 students, 6,608 minority included, about 2,200 teachers and over 70 schools including five high schools, a budget of over $50 million yearly.

The board of education has made every effort to expend their money in a fair and equitable manner throughout the district as to new school construction, quality staff members, and materials to work with. Title funds have been put to excellent use where applicable and proof has been shown our board of the positive effectiveness of the use of these funds, especially our reading program. I personally have made efforts to track down reports of neglect of minority neighborhood schools but have found them groundless, in fact, to the contrary, a financial study last spring, including Federal and State funds proved in some instances nearly double the per pupil expenditure in some minority areas could be shown.

Historically, Rockford, as many other communities across this Nation, operated under the neighborhood school concept.

Approximately 7 years ago and for several following years much pressure was exerted on the board by a past superintendent of Rockford schools, in concert with vocal militant minorities and some of the majority, to visit a forced busing program upon Rockford's schools. Some 15,000 residents signed petitions and waged great effort to stop forced busing by removing the superintendent who espoused such a plan. Some boundary changes for integration and two pilot busing programs were tried, taking minorities to all-white elementary schools. This latter program was doomed to failure by an unofficial, personal, dual discipline policy of the then superintendent, and had to be suspended because of methodical beatings carried on by the undisciplined children. This was unfortunate because many people tried to make this plan a success.

Upon electoral change of board members, the past superintendent was let go and a new superintendent sought. A period of peace and reduction of racial friction and tensions followed with much constructive work such as several "target schools" being developed to aid lower achieving areas, might be compared to "intensive care" in health field.

Enter into this climate the newly elected State superintendent of schools of Illinois who turned with great fervor to pressure for desegregation, even though not de jure, and many new goals for the seventies as he has called his multifaceted educational plan, arrived at by a series of public hearings, then screening the material so only the militant, catering to children's whims response with some general material, was included. He then declared 14 of our 70-odd schools in violation of his guidelines for racial representation, which in our district ran zero to 29 percent minority as a satisfactory range. Our State legislature passed a bill to limit his authority to force busing on school districts.

We also note that since 1970 our board has been under a harassment suit, filed in Federal court by a small group of adamant people who insist we are segregated, de jure, and must bus students to and fro for equal educational opportunities. Until this year the Federal district court has not felt, from the evidence presented, that said intervention was warranted.

This school year, 1973–74, has seen movement by the board to provide a voluntary integration plan including magnet schools and alternative schools with transportation and transfer to any Rockford school by any student as long as the movement aided in desegregation. We had nearly 800 avail themselves of this plan in 90 days, but the plaintiffs in the desegregation suit attempted to get an injunction to stop our voluntary plan, arguing it ineffective and forced busing necessary.

The judge did not grant the injunction, but using it as judicial blackmail, ordered our board to come up with a more positive plan or he would grant the injunction. This would call for forced busing and was to be presented by February 1, 1974.

The board did, via a 4 to 3 vote and much community polarization, on the rationale that this would please the judge, State superintendent, and retain local control of the plan. Meantime the rationale has changed among the Federal judges to now say, "If you have racial isolation in your district and have not taken strong measures to correct it, you are guilty of willful segregation." With this type of reasoning the judge has refused to consider the antibusing parents who have joined the suit on the side of the board and has put down their rationale as irrelevant.

The Federal judge has now allowed the Rockford Educational Association to participate to assist the board, over the board's objection, in planning desegregation. Historically the REA has been probusing all the way as an organization, though all the teacher members don't agree.

Rockford now stands with a grade exchange plan of forced busing for fall 1974 in which entire grades and teachers will be moved from school to school, integration to take place after they arrive at new school and participate in various activities there. This plan is approved by the State superintendent as a step in the right direction and is still to be ruled on by the Federal judge if acceptable as step 1.

I have with me petitions, all new ones, of 15,000 people against forced busing, only copy of those presented to the Governor of Illinois; as opposed to 400 people given our board by the plaintiff's attorney in their desegregation suit.

I am sure many more people than 15,000 will agree forced busing is not the panacea it is touted to be and will knowingly destroy much of our educational opportunities for the minority and the majority children—aside from much expense and waste of irreplaceable fuel and materials needed to bus children.

Forced busing has many hazards of frustration and the likelihood of increased racial tension and distrust among the community. A disaster, if you please.

We submit: Please retain neighborhood schools with emphasis on open housing so all Americans may choose and attend their neighborhood schools, also encourage voluntary transfer and avoid forced desegregation busing.

Thank you. I will be glad to answer any questions if you have any, Senator.

Senator ERVIN. I thank you for your statement.

Last year I happened to be in the State of New York and I talked with a superintendent of a school district. He told me that his school board was compelled to spend in excess of $1 million a year merely to bus childern to achieve a racial balance. He said that this was a great tragedy for education in this country. He said that his school board had many needs for teaching equipment and that it would be a great thing if they could spend a part of this $1 million in providing incentives to education by sending teachers to schools for further courses of instruction. He wondered how much more than this $1 million they were wasting merely on busing which could be put to laudable purposes to help our children to achieve superior education and how many more millions are being wasted throughout the United States.

Dr. SCHADE. You are so correct.

Senator ERVIN. Children normally make friends in their neighborhood, don't they?

Dr. SCHADE. Correct.

Senator ERVIN. All too often forced busing separates these children throughout the week and prevents association with their friends.

Dr. SCHADE. Our busing is estimated for this great exchange plan at $800,000 with the inflation by fall and with the difficulty of getting buses, I am sure it will exceed $1 million together with 7- to 21-percent program that would leave no all white schools in any one place or any all black schools; we figured $2½ million last spring when this was suggested. This is a fantastic waste of money.

The sad case is that I have had many black parents object to the busing plan. I have had many black children saying no way are you going to bus me. I have had many white children say the same thing. I would have had children arriving at schools frustrated as a discharged battery, and don't have the energy they should have.

I have also made the comment when we can no longer choose our neighborhood schools how long will it be before we cannot choose our neighborhood.

I understand in Oak Park, Ill., they are considering just such a plan where they are suggesting that each block may have 30 percent minority in that block will call for forced change of address. If this is American we have gone the wrong way.

Senator ERVIN. It is just a matter of degree between telling little children they must be bused to an fro merely to overcome racial imbalances and telling their parents where to live.

Dr. SCHADE. Correct.

I visited two of our predominant black schools last Thursday and took my wife along. They were two of the nicest schools in Rockford. I will say the feeling of the students and staff was tremendous, the people working as PTA's help the schools. The discipline was excellent and the one school will lose all their black teachers along with their black students come next fall, will leave them with a completely changed complexion.

Senator ERVIN. This is a tyranny which is practiced on white and black children alike, isn't it?

Dr. SCHADE. It certainly is. We, and I am sure, you, have one great interest, and that is the education, irrespective of race, color, or creed of our American children. We overlook one thing, however, and that is that they have to have a desire to wish to do—motivation is the big word that the educators use, and I am old fashioned enough to believe that before you get motivation you must show a need. In other words, you don't scratch if you don't itch, and you don't go trying to get your food unless you feel you are hungry.

This gets back to our welfare program, and it is a very sensitive subject, but it does tie in with this. People who really are in need and cannot help themselves—bless their hearts if we had to raise taxes, I would be for helping them, so don't misunderstand me—but to those who have worked and secured welfare or perpetuated welfare programs, black and white by the way, and on being urged by an instructor to better their education so they could have a better home, say look, my grandfather didn't work, my father didn't work, you don't think I am going to be stupid enough to work do you. How will you get a student like this to desire to work? We must have a normal rationale of need. We all work, Senator Ervin, most of us because of fear that we may lose our home, our groceries or in some way injure our family. You know, that is an old fashioned need. You do that, I do that. I am sure most of us do that. But the only way that is instilled is if that fear is somewhat real. Those who are playing a game should certainly be stopped because this is destroying their children and because they are seeing this as a practical application that you do not have to work, so why study. It is a tremendous reverse English of Americanism.

Senator **Ervin**. The great sculptor, Michelangelo, expressed the same thoughts you are expressing now in a very cryptic phrase. He said, "it is only well with me when I have a chisel in my hand."

Dr. **Schade**. Right, good work is a great therapy. It really is.

I had the opportunity to speak to a class of children, in one school I visited. I answered many questions from the youngsters, and these were extremely intelligent questions. They were very proper in allowing chances to speak back and forth and they were excellent. I said regardless of what you choose as a vocation, and you should begin to think of this early in life so you can set a goal—whatever this goal is try to get that what you like to do because the days will be light and the days will not be heavy and burdensome. One of them said, "like our teacher." Their teacher was a white teacher. They thought the world of her. They recognized the need to find your niche in life. In that way we should heip in every way we can. But we must temper our extreme giveaway programs which in effect destroy people.

Senator **Ervin**. The overall objective of education is to enable each boy and girl, all boys and girls, to make of themselves whatever God gave them any possibility to become, isn't that true?

Dr. **Schade**. You are right.

Senator **Ervin**. You do have to have motivation to make young people want to achieve, just like you have to have incentives to make adults achieve something.

Dr. **Schade**. You are right. How many people will have been excellent singers in an average community, and their talent is never really used. Perhaps a local plumber or carpenter, or sometimes tradesman, and they are very happy in their work. You know, they have their druthers. They say maybe I have a good voice but I don't want to have a singing career. Don't you think Americans should have that right and they are happy in it. You get back to the choice of the people to try and instill in their own children the great desire to make America what it should be. I call America the greatest do-it-yourself kit in the world, and it should be that way as much as possible because it allows each individual to express himself in the way of life he wants to live.

By the way, I have also encouraged as board president in the past and also encouraged comments from people who diversely were opposites of mine, and this is the American way and it is as it should be. I think the matter of booing someone down who wishes to speak is just as bad as a chairman who won't let him speak.

The other night we had 1,100 people at our meeting. Naturally they got carried away a little. As you have noticed, I have been their champion. As I spoke to them I said please, let us remain Americans.

Let us not become uncivilized. Let's go through the courts and the proper procedures of law and not get hotheaded and have any damage to children or buses or things of this type, never. They heeded this remarkably. I had the desegregation director, a black gentleman, Mr. Blackwell, come to me the next day at the Kiwanis and he thanked me for appealing to the crowd.

Senator Ervin, I think you are doing a tremendous service by trying to bring out the voices of the downtrodden majority of Americans. We never want to neglect our minority. We want to hear from them and do what we can to help, but I just don't see the minority directing the American scene over the objection of the majority.

Senator ERVIN. I have always felt that the essence of the American dream is that individuals should be as free from governmental regulation and coercion as the interests of the Commonwealth permit. It seems to me the whole concept of forced busing is alien to the American dream.

Dr. SCHADE. I agree 100 percent, Senator.

Senator ERVIN. There is another thing I have encountered in connection with this matter. I think forced busing and the arbitrary assignment of teachers on the basis of racial quotas to schools by Federal courts or HEW impedes the educational process in another way. There are many teachers, many capable teachers, who are limited to teach in a particular school located near their homes. Because of a longtime association with friends on the faculty of a particular school some teachers are unwilling to be required to travel long distances to other schools and be assigned to schools that they are not willing to teach in. This keeps a great many people out of the teaching profession and drives a great many from the teaching profession—many of the most competent teachers.

Dr. SCHADE. Certainly. This is a problem before us, so we must desegregate our staff as well.

It is interesting, a few years ago we had some very militant people get 380 students in open rebellion in front of one of our high schools. They sent runners through the building and said you, you, and you, you are black, get out there where you belong. This is not democracy to me. Immediately after the uproar I asked to meet with the black students having problems with their schools. I wanted to hear what they had to say. As we met, very privately, I explained to them what I wished for them to hear was what I had to say, not what the paper said I had to say. I wanted to hear from them what they had to say and not what some of the black militant organizations claimed they had to say. We sat down and really talked things over, and they were the most brilliant and most astute citizens you would want to sit with.

One of the amazing things was there were six counselors, and the students claimed two of the counselors were extremely interested in students and four, in their book, were interested in the clock. Also, amazingly enough, the counselor they thought the most of was a white counselor. We had been having a tremendous discourse in the community that it took a black counselor to understand and relate to a black student, and we should therefore secure more black counselors, which we attempted to do. I said it is amazing to me that you are hung up on this white counselor. Could we conclude, then, students that really—what makes a good counselor is not the color of the skin but the heart on the inside and the interest in children. They agreed. They see through this fallacy. I hope as coming citizens they will do a better job in combating some of these irregularities.

Senator ERVIN. I sometimes hear the argument made that forced busing to overcome racial imbalance or to achieve racial balance is justified because there is a great deal of busing in the United States to get children to the nearest school available for their age and scholastic attainments. It seems to me that those two types of busing are probably as dissimilar as two activities can be. One is an activity designed to deny children the right to attend neighborhood schools and to bus them to distant schools elsewhere merely to mix the races in the schools in certain proportions satisfactory to some HEW bureaucrat. The other is to get the child to the nearest school for his age and educational attainment. One is to implement some social scientist's misguided notions about how people should behave. The other is for a truly educational purpose.

Dr. SCHADE. Right. We have found the people in Rockford very strongly in favor in my urging of the neighborhood-school concept, but parallel with it, open housing. We have received standing ovations from a group of 1,100 the other night. When I had admonished them the American school is a great concept but along with that must go the dream that any American citizen has the right to live in that neighborhood, and they agreed. This is the pattern that will make for cooperative mixing of races and colors and creeds, where people will be there because they want to be there. This is why I have advocated the voluntary plan, because the attitude of the child and parent will be positive and it will prosper, whereas a negative attitude will not prosper.

Senator ERVIN. You agree with me in the observation that what this country needs at this particular moment is more individual freedom and less Government coercion?

Dr. SCHADE. Yes, indeed.

Senator ERVIN. Thank you very much for your very fine statement. It is extremely valuable because of your long connection with the public school system.

Dr. SCHADE. It has certainly been an honor to appear here, and I am happy to see you taking the stand you are now, sir. Thank you.

Senator ERVIN. The committee will stand in recess until tomorrow in room 3302 of the New Senate Office Building.

[Whereupon, at 11:40 a.m., the committee was recessed to meet Wednesday, February 20, 1974, in room 3302, New Senate Office Building.]

BUSING OF SCHOOLCHILDREN

WEDNESDAY, FEBRUARY 20, 1974

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 3302, Dirksen Senate Office Building, Senator Sam Ervin, Jr. (chairman), presiding.

Present: Senator Ervin.

Also present: William E. Pursley, Jr., chief counsel, Senate Subcommittee on Revision and Codification of Law.

Senator ERVIN. The subcommittee will come to order.

Since yesterday the chairman of the Judiciary Committee has referred to this subcommittee an additional bill designed to prohibit the involuntary busing of schoolchildren for integration purposes. This is Senate bill S. 2336, introduced by my colleague, Senator Helms. We will insert a copy of that bill in the record today and it will be considered along with the other bills which were placed in the record yesterday.

[The above referred to bill follows:]

93d CONGRESS
1st Session

S. 2336

IN THE SENATE OF THE UNITED STATES

August 3, 1973

Mr. Helms (for himself, Mr. Allen, Mr. Eastland, Mr. Scott of Virginia, and Mr. Thurmond) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To provide objective definitions of unitary school systems for uniform court enforcement of the Civil Rights Act, and to relieve the congestion of court calendars by providing for the orderly release of continuing Federal jurisdiction over desegregated schools, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Public School Jurisdiction Act of 1973".

Sec. 2. (a) The Congress finds that—

(1) the Supreme Court has repeatedly ruled that the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color,

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or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment;

(2) these and related court rulings have imposed upon public school agencies the burden of eliminating the vestiges of dual school systems and of establishing all school systems upon a unitary basis;

(3) the lack of appropriate statutory definition of a unitary school system has left the courts without objective standards in enforcing the equal protection of the laws in regard to pupil assignment, with a resulting lack of uniformity in enforcement and regulatory requirements;

(4) the courts have been overburdened with the complexity and length of the litigation and continuing judicial process for effective enforcement of the fourteenth amendment and the Civil Rights Act of 1964, and other related statutes.

(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, including, but not limited to section 5 of the fourteenth amendment, take action to enhance the enforcement of court determinations under the Civil Rights Act of 1964, to make court enforcement uniform by setting standards and definitions relative to a unitary school system, and to relieve the congestion of court calendars by providing for the orderly release of continuing Federal jurisdiction over desegregated public schools.

SEC. 3. Section 401 of the Civil Rights Act of 1964 is amended by adding at the end thereof the following:

"(e) 'Local educational agency' means any local educational agency as defined by section 801 (f) of the Elementary and Secondary Education Act of 1965.

"(f) 'State educational agency' means a State educational agency as defined by section 801 (k) of the Elementary and Secondary Education Act of 1965.

"(g) 'Unitary school system' means any public school system in which—

"(1) the local educational agency has complied with an order of any court of the United States based on racial enrollment criteria for the public schools of that agency, or is in compliance with any specific plan or published guideline authorized or approved by the Commissioner of Education with respect to such enrollment criteria; or

"(2) the presently used procedure for assignment of children and teachers in the elementary and secondary schools of the local educational agency has been found by any court of the United States to be in compliance with the Constitution and laws of the United States against a charge that the schools of such agency were segregated; or

"(3) the assignment of children to elementary and secondary schools of that agency is by attendance zones which are or have been found by any court of the United States (a) to have been originally established with reasonable geographical divisions without intent to discriminate between areas on the basis of race, color, or national origin, and (b) to have not thereafter been altered except to accord with and meet conditions caused by population increases or decreases in the area served, granting to such agency the right to reasonable educational discretion in the creation or elimination of neighborhood school zones in geographically contiguous areas without regard to the racial composition of the affected residential area; or

"(4) not less than two-thirds of the schools of a local educational agency have a racial composition of the student body of each school which shall contain a percentage of majority students which is not less than one-third of the percentage of majority students in the school population taken as a whole, and a percentage of minority students which is not less than one-third of the percentage of minority students in the school population taken as a whole.".

SEC. 4. Title IV of the Civil Rights Act of 1964 is amended by adding at the end thereof the following new section:

"ORDERLY TERMINATION OF FEDERAL JURISDICTION OVER STATE EDUCATIONAL AGENCIES

"SEC. 411. (a) The continuing applicability of any order of any district court or court of appeals of the United States requiring the desegregation of the public elementary and secondary schools of a local educational agency shall terminate upon a determination by jury in the issuing court or by a court having review jurisdiction thereover that such schools of the defendant local educational agency are and have been a unitary school system as defined in section 401 of the Civil Rights Act of 1964 for a period of not less than a full school year since their establishment or following any voluntary or required organization thereof.

"(b) No district court or court of appeals of the United States shall have original, continuing, or pendent jurisdiction to issue in any case or controversy, in law or in equity, any writ, process, rule, decree, order or command directing, forbidding, or changing (A) the assignment or transportation of any student or students to any public elementary or secondary school made, provided, or proposed pursuant to the determination and direction of the State or local educational agency operating or having supervisory powers over the operation of such school, or (B) the employment, assignment, reassignment, transfer, or retention of any member of the teaching or administrative staff of any such school, or (C) any appropriation or expenditure of any funds for the construction, maintenance, equipment, or operation of any such school, or (D) the accreditation of any such school by any public or private agency, or its inclusion in any published list or directory of accredited schools, if such school is, or is part of, a unitary public school system as defined in section 401 (g) of the Civil Rights Act of 1964, and has been so for the period specified in paragraph (a) of this section.

"(c) The provisions of this section shall apply with respect to any civil case or controversy now pending or hereafter brought in or removed to any court of the United States for or with respect to the desegregation of the public elementary and secondary schools of the local educational agency or for or with respect to the appropriation or expenditure of funds for the construction, equipment, maintenance, operation, or support thereof.

"(d) On application therefor by any local educational agency, or by the parent of any student enrolled in any school operated by such agency, or by any State educational agency or any State officer having supervisory authority over the public elementary and secondary schools of such local educational agency, any prior judgment, decree, or order of any district court of the United States or of any court of appeals of the United States related to, providing for, or concerning the assignment or transportation of students in or to the public elementary and secondary schools of such local educational agency, as a means to end or prevent or correct the effects of segregation of students in the schools of such agency on the basis of race, color, or national origin, shall be reopened by such court and the court shall thereupon promptly submit to jury determination as a question of fact whether or not the public elementary and secondary schools of such agency are, and have been, for the period specified in paragraph (a) of this section, a unitary school system as defined in section 401 of the Civil Rights Act of 1964. Such application shall be made by a motion in the cause in the case or controversy and in the court in which such judgment, decree, or order has been requested or was entered. Such application shall be heard and the determination thereby prayed shall be made within twelve months from the date on which the application was filed. The filing of any such application shall stay the enforcement of any existing order pending final determination of the issue thereby raised.

"(e) Nothing contained in this section shall limit the right of a local educational agency to change or alter its administrative or financial policies following the termination of Federal jurisdiction by reason of this section: *Provided, however,* That—

"(i) no such change thereafter made shall be for the purpose of discriminating against any class of students or employees on the basis of race, color, or national origin, and

"(ii) no student shall be denied the right to continue thereafter to attend the school to which such student was assigned prior to such change and to be furnished the necessary transportation therefor.

"(f) Nothing contained in this section shall limit the existing jurisdiction of the courts of any State with respect to the public elementary and secondary schools of that State, nor limit or affect the established review jurisdiction of the Supreme Court of the United States over decisions of the highest courts of the several States.".

SEC. 5. If any provision of this Act or of any amendment made by this Act, or the application of any such provision to any person or circumstances is held invalid, the remainder of the provisions of this Act and of the amendments made by this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Senator ERVIN. Senator Allen is the first witness today. Senator Allen is a cosponsor of the bill I have introduced and has been a staunch opponent of involuntary busing of schoolchildren for the purpose of achieving what is called "racial balance" or removing what is called a "racial imbalance." We are delighted to have Sentor Allen with us as our first witness this morning.

TESTIMONY OF HON. JAMES B. ALLEN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator ALLEN. Thank you, Mr. Chairman, members of the subcommittee.

I appreciate this opportunity of appearing before the subcommittee, headed by a great statesman, the distinguished senior Senator from North Carolina, whose feats I might say I have studied since I have been in the Senate and with whom I have worked shoulder to shoulder in the Senate, in committee, and on the floor of the Senate, in the furtherance of principles of good government. I have been honored to follow the leadership of the distinguished Senator from North Carolina.

Senator ERVIN. That has been a mutual undertaking, because often I follow the leadership of the Senator from Alabama.

Senator ALLEN. That has been the other way around most of the time.

I want to assure you that has no connection with this hearing, possibly, but I regret the decision of the distinguished senior Senator of North Carolina not to remain in the Senate, and I feel that the Senate will lose much of its luster as the greatest deliberative body in the world when the distinguished senior Senator from North Carolina, Mr. Ervin, is no longer on the floor of the Senate to give his wise counsel to the Members there and to work for constitutional principles to which he has dedicated his life. I know that all of the Members of the Senate join me in expressing our deep personal sorrow at the decision of Senator Ervin not to come back to the Senate for the next session.

Senator ERVIN. I am deeply grateful for those remarks, and I would ask the recording angel—to drop a tear and blot out the iniquities engaged in by the distinguished Senator from Alabama when he prevaricated so eloquently in my behalf.

Senator ALLEN. I will be willing to answer for what I said.

I welcome the opportunity to testify in support of S. 619, cited as the Uniform Criteria Act of 1973 as well as S. 1737, a freedom of choice bill introduced by the distinguished Senator from North Carolina, Mr. Ervin, of which I have the honor of being a cosponsor.

These bills are two of several presently before the subcommittee which are designed to curb abuses of power associated with the practice of massive forced busing and crossbusing of schoolchildren.

As you know, Senators Ervin, Baker, Bible, Buckley, Helms, Nunn, Scott of Virginia, Sparkman, Stennis, Talmadge, Thurmond, and Tower joined in sponsoring S. 619. I feel that many other Members of the Senate would also have subscribed to it had the matter been called to their attention.

I am confident that none of us considers our proposal a panacea. Therefore, in speaking in support of the bill, we also support other bills before the committee with similar objectives. I am confident that after the subcommittee has carefully considered all proposals, it will combine the best provisions of each into a committee bill which, when enacted into law, will curb both executive and judicial abuses of power characterized by disruptive forced busing and cross-busing schemes.

I was happy to note that yesterday the distinguished chairman stated that he was in favor of a statute to forbid forced busing of schoolchildren to be followed by a constitutional amendment. The distinguished Senator from North Carolina is a foremost, if not the foremost, constitutional authority in this country in or out of the Senate. If Senator Ervin feels that this matter can be accomplished by statute under the Constitution I would feel that that would be highly persuasive of a statute, properly worded, being upheld by the Supreme Court.

Mr. Chairman, before reaching the merits of S. 619, I want to take this opportunity to compliment you and members of the subcommittee for your initiative in instituting these hearings. The hearings are both timely and of urgent importance, not only to individual victims of forced busing schemes, but also to Congress and to the Nation.

Mr. Chairman, seldom in the history of our Nation have we faced a situation where overwhelming numbers of citizens were simultaneously critical of the performance of the executive, legislative, and judicial branches of the Federal Government. We face that situation today. The reasons for popular disillusionment with the separate branches are different, but the complaint of unresponsiveness of the Federal Government to the will and wishes of a vast majority of the people is applicable to each. On reflection, I think the complaint is justified.

For one thing, the Federal judiciary is not responsible to the people and was not intended to be; and it can hardly be expected to be responsive to the will of the people.

While the executive is responsible to the people it is not necessarily responsive to the will of the people. In fact, the Federal bureaucracy is well nigh uncontrollable and far too often is responsive neither to the people nor to their elected representatives.

Finally, there is increasing evidence that the vast majority of the people are dissatisfied with the performance of Congress. The charge against Congress is that it is not only not responsive, but also that it thwarts the will of the majority by many affirmative enactments and by denying the people recourse to constitutional amendment to protect what they conceive to be cherished liberties. I might state a recent Harris poll indicated an approval rating of some 20 percent for Congress as against some 24- or 28-percent approval for the Chief Executive.

Mr. Chairman, it is not my purpose or desire to make a case against Congress or to be unduly critical of Congress. However, I sincerely believe that congressional inaction in the face of overwhelming sentiment against forced busing is a tremendously important factor in the erosion of confidence in Congress. These hearings are very important as a concrete manifestation that a substantial number of the Members of Congress are concerned about just grievances stemming from a misuse of the coercive power of Government in the area of forced busing.

Mr. Chairman, the hostility of the people to the idea that the Federal Government has the power to yank up children and transport them to distant schools in conformity with half-baked sociological theories is illustrated by poll results. I will offer some of the fairly recent polls as exhibits. For the moment let me read some of the captions. From an April 1970, Gallup poll, "Public Opposes Busing by a Margin of Eight to One"; from the publication Nation's Schools, June 1970, issue, "Forced Busing Vetoed by 90 percent of Schoolmen"; from a 1971 Gallup poll, "76 percent of Public Opposes Busing"; from a March 1972, Florida poll, "74 percent Back Antibusing Amendment"; from a September 1973 Gallup poll, "Only one person in 20—five percent—selects busing from a list of plans that have been suggested as ways to achieve integration in public schools * * *"

Mr. Chairman, can you imagine the results were the pollsters to ask, "Do you favor busing and cross-busing as imposed in Charlotte, N.C.?" I notice on the agenda today we have Mr. Poe, chairman of the Charlotte-Mecklenburg School Board as a witness, and also Mr. Rowe who represents Henrico County Parent-Teachers Association. I will certainly be anxious to hear their testimony.

Or, in the alternative, the question, "Do you favor closing neighborhood schools and consequent busing of your children to distant schools?" There can be no doubt where the sentiment of the people lies on these questions. Yet Congress has taken no affirmative action to respond to the will of the people on this issue. That is, it has taken no affirmative action that the Supreme Court has upheld as an affirmative action, applicable to sections of the country where we are said to have de jure segregation. The Supreme Court has held that the words of limitation that the Congress has heretofore placed on forced busing or transportation of students gave protection only in those areas where segregation is said to be de facto.

Massive forced busing goes on in the South and is spreading throughout the Nation.

Congress cannot reasonably continue to neglect the will of the people on this issue.

Mr. Chairman, I need not remind the members of this committee that the first question to be decided is whether Congress has the power to curb massive forced busing and cross busing. Since we are dealing with an alleged denial of equal protection of the laws under the 14th amendment, the power of Congress to deal with the problem is unmistakably clear. Section 5 of the amendments provides:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Innumerable civil rights acts have been enacted in the exercise by Congress of this power. But, the argument is advanced that Congress can enact laws only to broaden rights protected by the 14th amendment and not laws which delineate the rights so protected. The poverty of this argument is illustrated by the fact that many liberals in Congress, who advance the argument, have insisted on doing what they say Congress has no power to do. They have supported enactments which specifically exclude the executive and Federal courts from interfering in the extensive system of segregated schools located in areas outside of the South.

Obviously, if Congress can exclude certain types of segregation from protection of the 14th amendment, it can properly limit the use of the coercive power of the Federal Government in the vindication of rights which Congress may determine are protected under the equal protection clause—or for that matter, rights which the Supreme Court may determine are protected by the amendment.

Traditionally Congress has determined rights and remedies under all of the so-called civil rights amendments. Witness the innumerable civil rights acts enacted since the amendment was adopted. However, in the school cases, the U.S. Supreme Court took the initiative by reversing a longstanding precedent and the Court prescribed its own remedies—and there is the rub. The Court invoked its equity power and vested jurisdiction of school desegregation cases in inferior courts and authorized U.S. district court judges to fashion equitable remedies.

The equity power of a court is a power of discretion in judges. In earlier days, it was recognized as a discretionary power to decide questions concerning the meaning of the Constitution in law, and also its meaning in equity. In this connection, the eminent New York jurist, Robert Yates, an anti-Federalist, warned of the danger of vesting in an independent Federal judiciary the power to construe the Constitution by what judges in their discretion might from time to time consider the spirit or grand design of the Constitution rather than the letter of the instrument. Yates wrote:

"From this method of interpreting laws (says Blackstone) by the reason of them, arises what we call equity"; which is thus defined by Grotius, "the correction of that, wherein the law, by reason of its universality, is deficient; for since the laws of all cases cannot be foreseen, or expressed, it is necessary, that when the decrees of the law cannot be applied to particular cases, there should somewhere be a power vested of defining those circumstances which had they been foreseen the legislator would have expressed"; and these are the cases, which according to Grotius, "lex non exacte definit, fed arbitrio boni viri permittet."

Mr. Chairman, we have inherited some of the problems foreseen by Robert Yates. For example, the *Brown I* decision is the result of an equitable construction of the Constitution which reversed a prior equitable construction of the 14th amendment, as it applies to public schools. Obviously Congress could not have foreseen this reversal of a prior Supreme Court decision, and therefore no statutory remedies were available to the Court. Consequently, the Court invoked its equity power to prescribe remedies in its own discretion. The Supreme Court has since complained of the absence of guidance from Congress in formulating remedies. Therein, Mr. Chairman, lies the theory of S. 619, which does prescribe the remedies which a Federal court may use in breaking down segregation and providing for desegregation of schools.

Despite the fact that the Supreme Court has since complained of the absence of guidance from Congress in formulating remedies, Congress has not acted and we are continuing to suffer the consequences of the abuse of near limitless discretion of Federal judges.

Heretofore Congress has limited the exercise of discretionary power in Federal judges in the use of injunctions, and it can certainly limit the use of a mandatory injunction to coerce the people into accepting massive uprooting of schoolchildren and forcibly transporting them from school to school in the discretion of Federal judges. The question is, Will Congress perform its duty to provide statutory remedies in school cases, or will it continue to permit Federal court judges to formulate remedies consistent with the sociological hang-up of individual judges?

I hope no one will take lightly this matter of abuses of the equity power of discretion in judges in the field of education. Let me read portions of a resolution adopted by the School Board of Chesterfield County which was under mandatory injunction of a U.S. district court judge. This is the case, in which in the exercise of equity power, the judge ordered the consolidation of school systems of three separate political subdivisions of the State of Virginia in order to meet an arbitrary racial quota in each of these school systems. I am sure Mr. Rowe, representing the parents and teachers of one of these counties, will comment on that. However, to illustrate the abuse of discretionary power in Federal judges to coerce public officials, let me read a few excerpts from the resolution adopted by the board:

> Whereas, if the members of this Board remained free to vote in accord with their independent and collective judgment and will, they would unanimously refuse to request the State Board of Education to create a single division to be composed of the Counties of Chesterfield and Henrico and the City of Richmond; and
>
> Whereas, our attorney aforesaid has advised us that the Order of January 10, 1972, mandatorily directs that we cast our vote in favor of a "request" that the State Board of Education create a single division composed of the Counties of Chesterfield and Henrico and the City of Richmond on or before 30 days from January 10, 1972, under pain of punishment for contempt by fine or imprisonment should we fail to do so.
>
> Now, therefore, acting under the duress, coercion, and compulsion of the penalties consequent upon doing otherwise, and acting contrary to our individual and collective judgment and wills, and under the compulsion of the Order aforesaid, we do adopt and vote for the following:

Mr. Chairman, if we multiply this example of coercion by the number of school boards in the 16 Southern and border States, we grasp the magnitude of the judicial tyranny which pervades nearly a third of the States of our Nation. It is of little comfort to know that this particular case was reversed by the U.S. Court of Appeals for the Fourth Circuit and that the reversal was allowed to stand by the narrow thread of an equally divided U.S. Supreme Court. I would hope that if Mr. Justice Powell had not excused himself from consideration of the matter that the matter would have been decided by a five to four vote. We are hopeful that he will take that view in future cases coming before the Supreme Court.

The fact remains that if it is within the discretionary power of the U.S. district court judges to enter such decrees, it is within the discretionary power of the U.S. Supreme Court to uphold such decrees, unless Congress decides otherwise.

In the case just mentioned about 106,000 pupils were involved, The judge, in the exercise of his discretion, decided to create what would have been one of the largest school districts in the United States covering an area of 752 square miles. The children in this Mammoth district who would be denied the right to attend the school closest to their respective places of residence were to be chosen—would you believe it—by lot. The principal witness in the case was a sociologist who advanced a theory of "viable racial mix." The U.S. district court judge bought the theory hook, line and sinker. His opinion bristledwith statistics and racial ratios. In toto the record of the case is a hideous but "viable" example of judicial abuse of a discretionary power which must be curtailed by Congress.

Mr. Chairman, it is true that up until now the parents and schoolchildren in the South have borne the brunt of the hardships and disrupted education and lives of children affected by compassionless U.S. district court judges.

I might say parenthetically, Mr. Chairman, this is in essence and in substance not a racial issue or question, because in most cases, or more often than not, it is the black schoolchildren who are being transported, and the black community does not like busing any more than does the white community. It is not a racial issue or question whatsoever. The question is what is for the best interests of the child. Let's quit thinking about the desirability of moving bodies around and let's educate our children, give them the best possible education where we find them, in the neighborhood school or in the school next to or nearest their place of residence.

By now, the U.S. Supreme Court in the exercise of its discretion has reached out to Denver, Colo., and, as one Supreme Court Justice put it—

> The Court's (U.S. Supreme Court) opinion virtually compels the finding on remand that Denver has a dual school system. That city will then be under an affirmative duty to desegregate its entire system "root and branch." Again the critical question is what ought this constitutional duty entail.

The question presented is one which Congress must answer. Congress must determine the nature and scope of the remedy. Otherwise, the remedy will be left to the discretion of judges who have shown no reluctance to order massive busing and cross busing such as was inflicted upon the citizens of Charlotte, N.C. Unfortunately the Charlotte remedy, approved by the U.S. Supreme Court, became the model for all U.S. district court judges. I am sure that our distinguished colleague, Mr. Richardson Preyer, will have some comments to make on this subject. Certainly we are anxious to hear from him.

Mr. Chairman, you have before you the separate provision of S. 619 and S. 1737 sponsored by the distinguished chairman. I will not elaborate on them. I will point out that among the many limitations on busing contained in the bill, not one conflicts with any ruling of the U.S. Supreme Court nor do they singly or collectively deny any person a constitutionally protected right. It would impose reasonable and humane limitations on the discretionary powers of U.S. district courts in formulating desegregation decrees when such decrees involved busing of children.

I do hope that the committee will agree to the statements of policy and purpose in the bill that all persons in the United States are entitled to freedom from coercion imposed in the exercise of limitless discretionary powers by any branch, agency, or officer of the U.S. Government and that it is in the public interest to terminate at the earliest practicable date by means consistent with the Constitution the involvement of U.S. courts in decisions affecting the operation, management and control of public schools.

One final word—there are no dual school systems in the South—they were stricken down by the 1954 decision.

I might say at this point, Mr. Chairman, as the chairman well knows, the Supreme Court has changed course 180 degrees in this regard; whereas the 1954 decision said that the State could not segregate by race, now they hold that the State has the burden of assigning by race in order to accomplish desegregation. What they could not do on the one hand in 1954 they are now being required to do under the Supreme Court's theories at this time.

Senator ERVIN. To state that in another way, under the *Brown* case it was unconstitutional to take into consideration a child's race in making assignments to schools.

Senator ALLEN. That is right.

Senator ERVIN. Now it is unconstitutional not to take into consideration a child's race in assigning children to schools. Indeed, it has been determined that race should be the prime consideration in assigning a child to school.

Senator ALLEN. That is correct, and that is a change of course of 180 degrees.

Senator ERVIN. It reminds me of Aesop's Fable about the man who got lost in the woods and was discovered by this satyr who promised to take him home and let him spend the night. Before the traveler got to the house he blew on his hands. The satyr asked him why he was blowing on his hands. The traveler answered, to warm them. He got to the satyr's home and the satyr prepared him a meal of hot porridge. The traveler blew on the hot porridge and the satyr said, what are you doing that for. The traveler answered, to cool the porridge. The satyr said "Get out! I am not going to have anything to do with a man who blows hot and cold with the same breath."

Since 1954 the Supreme Court of the United States has been blowing hot and cold with the same constitutional provision. In 1954 it meant one thing and now it means exactly the opposite.

Senator ALLEN. That is correct.

Senator ERVIN. And yet the Constitution provides only one way for the Constitution to be changed and that is by amendment.

Senator ALLEN. I thank you, Mr. Chairman.

Senator ERVIN. I don't think that the Constitution is hot when the Supreme Court votes on it in one way and cold when it votes on it in another.

Senator ALLEN. One final word, there are no dual school systems in the South. Federal judges continue their involvement under the pretext of eliminating "vestiges" of dual school sytems. Translated that means that there are schools which do not have a racial ratio of pupils as reflected in the population as a whole. Of course, the U.S. Supreme Court has said that the Constitution does not require that each school have a precise racial balance. But, then, it said that any deviation from racial balance is prima facie evidence of a dual school system and therefore, a constitutional violation.

Senator ERVIN. That is another interesting point. In the *Swann* case the Chief Justice said that if the district judge had ordered a precise racial quota based on respective racial proportions of the population of the territories served by the schools they would have reversed the decision. It would have been unconstitutional. Nevertheless, the Court said it was a good starting point. In other words, the Supreme Court held that an unconstitutional point is a good starting point to enforce the Constitution.

Senator ALLEN. Accordingly, school systems are compelled to achieve, as nearly as possible, by one means or another, a racial balance in the schools. But, of course, this is only a part of a shameful heritage from the U.S. Supreme Court of nonthink, double talk, and judicial exposition with cryptic key words to confound and confuse the issue and the people.

Mr. Chairman, let me say this in conclusion. Congress has the power to correct this situation. In my judgment it has a duty to correct it. It is my sincere and solemn hope that the committee will put together a bill which, if it does not accept the bills in the present language, will shackle the unlimited discretionary powers of Federal judges to tyrannize the people of our Nation, and particularly the people of my section of the country. But I would give warning to the other sections of the country that what we are going through in the South is something that they can look forward to in the future if it does not stop at this point.

I thank the Chair.

Senator ERVIN. I am intrigued very much by the *Swann* case. I filed an amicus curiae brief on behalf of the Charlotte-Mecklenburg Teachers Association. If one assumes that the purpose of all judicial proceedings is to ascertain truth, I think one would use the same rule to ascertain the truth. And yet, in this case, the court says in the South you use a different method of ascertaining the truth than in other parts of the country. In a so-called desegregaton case in a State which did not have legally segregated schools in May 1954, those who want a desegregation decree must prove affirmatively that there has been discriminatory practice in assigning children to that school system.

On the contrary, if you wish to obtain a school desegregation decree in an area which maintained segregated schools on the day of the Supreme Court's announcement in the *Brown* case, you have the benefit of a presumption that there has been discrimination. When you analyze that, it comes down to this: the Supreme Court held until the *Brown* case that the "separate but equal" doctrine was in conformity with the equal protection clause. On that day they threw that doctrine out the window. So you have this adverse presumption applied in Southern States because the Southern States were not smart enough to discover before the Supreme Court apprehended the fact that the "separate but equal" doctrine was no longer to be a part of the law of the land. In other words, these States are being penalized by this artificial rule of evidence developed by the Supreme Court because they were not smarter than the Supreme Court and did not anticipate that the Supreme Court was going to change its mind.

Senator ALLEN. I might say in that connection, Mr. Chairman, I recall when the Stennis amendment was under debate there in the Senate, an amendment which sought to apply the same standards and criteria for desegregation of public schools throughout the Nation, one distinguished Senator from a section outside the South made the statement on the floor of the Senate that the provision would require the calling out of the entire Army to enforce it in the area in which he lived. Yet, he was perfectly willing for these methods to be used in the South. He did not want them in his section of the country.

I thank you, Mr. Chairman.

Senator ERVIN. Thank you very much for a very fine statement.

The next witness is Congressman Richardson Preyer, one of the ablest members of Congress, in the judgment of this chairman, and one who has long been interested in bringing peace to our troubled school system, as I understand it, by reestablishing the concept of neighborhood schools.

We are glad to have you here to help on this matter.

TESTIMONY OF HON. RICHARDSON PREYER, A REPRESENTATIVE IN THE U.S. CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. PREYER. Thank you very much, Mr. Chairman.

It is an honor to appear before this distinguished subcommittee. I express the pride of the entire State of North Carolina in its chairman.

I regret, like Senator Allen, very much that in the future we will not have as frequent an opportunity to hear the Aesop's Fables and King James' version of the Bible and other words of wisdom from the chairman.

The objective of providing a quality education for all children is now fully accepted in this country. The principle of legal official segregation has been denied everywhere. The legal structure of segregated schools has been destroyed and the idea repudiated. For moral as well as historical reasons, all of the United States stand firmly for the principles of racial equality.

The goal, then, is universally agreed on. But, the question is one not of goals but of the wisest choice of means to achieve racial desegregation in the schools. The courts have adjudged proportional racial balancing, achieved by busing, as the best temporary answer. But this is a bad long-term answer. It is disruptive to society; it damages our educational system. It results in resegregation and therefore is futile by its own terms.

Some people genuinely believe that forced busing is the only way to overcome years of racial separation; some see the resistance to forced busing as being caused primarily by white racism. I believe that forced busing is unnecessary to achieve an integrated society. Nor are the difficulties aroused caused by forced busing caused primarily by white racism. While a small number of parents may be diehard segregationists, I submit that the majority of them are conscientious and sincere and are concerned for the welfare of their children. They are good citizens, who, by and large, have faithfully supported public education and who have provided the resources to nourish it. They have also accepted integration as right and just. But they are heartsick to see the deterioration in discipline and in the quality of education in our schools and what that means for the future of their children. They see the educational life chances of their children being jeopardized in the interest of improving others. They do not object to leveling up——

Senator ERVIN. If you will pardon me for interrupting there, it seems to me there is another objection to forced busing. Because it necessarily requires the children to be prepared to start to school earlier than they otherwise would if they were allowed to attend the neighborhood schools, it upsets the housekeeping arrangement of practically every home in which a child resides who is subjected to forced busing.

Mr. PREYER. I think the chairman is absolutely right on that.

Another, I suppose you would call it noneducational disruption of that sort, is extracurricular activities in late afternoons which is impaired considerably.

As far as educational leveling goes, parents violently resist leveling down.

In particular, parents objects to the extensive two-way form of busing which is increasingly being utilized to produce proportional racial mixtures throughout an entire school system. It is this form of busing—involving the transportation of white children to ghetto schools—which the courts have not only increasingly ordered, but which many white parents, both North and South, heatedly oppose. As Senator Allen pointed out, many black parents oppose busing away from the neighborhood schools.

In some demographic settings, two-way busing works well; for example, in rural areas or in smaller cities with relatively small minority populations. Lenoir, N.C., would be an example of that. But in other areas, especially in larger cities, large-scale busing is counterproductive, stimulating white flight from the public schools. It will be recalled that studies of black achievements—I am speaking primarily of the Coleman report here—have found that desegregation accomplishes little educational benefit unless black children are placed in majority-white schools. Once a school "tips over" and has a black majority, the black students begin to feel themselves once again in a black school. Moreover, the number of whites begins rapidly to diminish, and white financial and political support for the entire school system becomes endangered. Available evidence indicates that stabilized integration is unlikely in school systems which have 40 percent or more black pupils.

What is clear, then, is that in certain demographic settings—such as the common one of a predominantly black central city surrounded by white suburbs with separate school districts—a program of massive busing will likely be counterproductive. Not only will the educational benefits of desegregation be impossible to realize in a majority-black setting, but the attempt to achieve them may succeed only in driving more white families from the system. Future attempts to tackle the problem of de facto segregation in northern metropolitan areas, as well as in a few remaining large cities in the South, such as Memphis, will run squarely up against this dilemma.

It also runs up against public resentment. Polls indicate that while 66 percent of the public approve of school desegregation, 69 percent opposed the use of busing in order to inplement it.

What should we do about this dilemma? I think this is a key problem here. How can we harmonize the belief in desegregated schools which polls show the American people want with the desire for the best education possible for their children. Senator Allen points out Congress can't neglect the will of the people. In this area the will of the people seems to be to pursue two different goals. How can we reconcile that?

Clearly, a national commitment to the goal of quality integrated education must be maintained, for equal educational opportunity is the primary agent for economic and social progress. We must achieve it because it is our constitutional mandate to do so, and we must do it because it is right. But we must do it by some alternative plan involving far lesser amounts of busing, or else we risk losing the goal itself—the goal of equal educational opportunity.

The alternatives suggested by the bills before this committee involve restricting court remedies or limiting the jurisdiction of Federal courts. As this subcommittee knows better than anyone else, some difficult questions of law arise whenever Congress attempts to control judicial decrees in an area in which the courts are applying the Constitution. I don't pass on the merits of that. I just say we will be running into problems when we run into questions on it.

In view of that, I would like to suggest an alternative approach which avoids there problems. Congress unquestionably has the authority to deal at large with the problems of education. I suggest that Congress' goal should be to use its legislative power to reduce the need for busing in achieving a unitary school system. Rather than seeking to stop the courts from granting certain remedies, Congress should attack the problems at which those remedies are directed, by encouraging practical plans by which communities might achieve desegregation without massive busing.

Better plans can minimize, and I think in many settings totally eliminate, although in some settings probably not totally eliminate, the need for busing while maximizing the educational gain for all children. Workable plans exist, although the variety of demographic settings prevents any single categorical answer, any single plan from being the best solution. Communities must choose the means best suited to their own circumstances. What works in one setting may be counterproductive in another. Most communities will probably find that a combination of various devices is most suitable.

How can we bring about this new educational reality and develop constructive alternatives for the courts' consideration? Such alternatives will appear only when the reins of education control are handed back to local officials. Otherwise, embittered communities will continue to watch from the sidelines as the courts administer clumsy and drastic remedies to their educational ailments. Community involvement and community control might become a reality if local school districts were required to take a hard, organized look at their problems and then to devise a comprehensive 10-year plan for improvement. Such a plan would be more than a simple desegregation scheme. It would necessarily include methods to reduce racial concentrations, but it would also include any number of innovative techniques to improve the educational process as a whole. Significantly, there is every reason to believe that school districts in the process of charting their own educational course might be viewed differently by Federal judges who so often in the past have had only a choice of either issuing a busing decree or seeing nothing done.

The kind of innovative techniques that can be used to substitute for massive busing include such things as:

(1) Magnet schools with open enrollment which can be used as a means of voluntarily attracting students of all races. For example, one high school might be set aside as a math and science center, hopefully attracting students interested in pursuing those subjects in more depth. Or special courses could be offered only at a particular school. Pupils would be drawn from other schools for only part of the day, and solely for the purpose of taking the special course.

(2) Rezoning plans are an easy and inexpensive way to achieve desegregation and yet maintain neighborhood schools under some demographic conditions. In the case of larger metropolitan areas where this is difficult as a longer range goal, schools (especially comprehensive high schools) could be built in a "ring" pattern (as in Nashville) so that the schools are approximately equidistant from the city's center and the outer fringes of the county.

(3) Cooperative exchanges, and joint participation programs for minority and nonminority students who attend different schools, whether public or private.

(4) The voucher system, and this is a more far-reaching and radical suggestion, under which parents of school-age children are given vouchers which are worth the amount of money the school system would spend on a single child's education in that district. The parent is free to choose where he will spend the voucher. Any school, public or private, may take part, if it meets the requirements established for participation. The effect will be to create competition among the schools in the system as each seeks to attract the voucher payments of parents. To encourage the admission of disadvantaged students, such student's vouchers could be worth twice as much. There are several of these programs underway now as experiments.

Some combination of measures like the above (when embodied in a plan developed by local officials in consultation with local educational agencies, and a local advisory committee including parents of students), will allow communities to increase racial mixing in the schools without automatic resort, as is presently the case, to massive crosstown busing.

These suggestions are embodied in a bill introduced in the House by Congressman Udall of Arizona and myself. The principal draftsman of the bill is Prof. Alexander Bickel, noted constitutional law expert and professor of law at Yale Law School. I respectfully submit this approach to your attention.

To sum up: proportional racial balance, as ordered by the courts, is not the best and it is not the only way to reach the goals of improving our schools and providing equal educational opportunities. Rather, we should put our funds and our energies into developing new educational plans, locally evolved and locally administered.

Thank you very much, Mr. Chairman, for this opportunity to testify.

Senator ERVIN. The committee does not have a copy of your bill. I would appreciate it very much if you would supply the committee with a copy of the bill, H.R. 10991, so we can put it in the record with these other bills.

Mr. PREYER. Yes, sir. I will be glad to do that.

Senator ERVIN. Thank you very much.

[The above referred to bill follows:]

93d CONGRESS
1st Session

H. R. 10991

IN THE HOUSE OF REPRESENTATIVES

October 17, 1973

Mr. Preyer (for himself and Mr. Udall) introduced the following bill; which was referred to the Committee on Education and Labor

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A BILL

To provide for affording equal educational opportunities for students in the Nation's elementary and secondary schools.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Educational Opportunities Act".

STATEMENT OF FINDINGS

Sec. 2. The Congress finds that—

(a) The time is at hand when substantially all school systems administered or directed by local educational agencies will, in compliance with the Constitution, have become unitary.

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(b) As the demography of the Nation continues to change, local educational agencies are not required by the Constitution to make year-by-year adjustments of the racial composition of student bodies, once the affirmative duty to desegregate has been fulfilled and racial discrimination through official action in public schools has been eliminated. In the absence of a showing that either a local educational agency or another agency of a State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further Federal intervention to secure performance of the affirmative constitutional duty to desegregate is not called for.

(c) Throughout the Nation inequality in education opportunity persists for children from minority groups and from low-income families, and the educational results achieved with such children are often below the results achieved with children from other racial and socioeconomic backgrounds.

(d) Throughout the Nation minority group children and children from low-income families are often concentrated in schools in which they form a majority of the student population.

PURPOSE

SEC. 3. It is the purpose of this Act:

(a) To improve and to equalize the results achieved by elementary and secondary education throughout the Nation.

(b) To encourage, where possible consistently with the objectives stated in subsection (a) of this section, the elimination of the concentration of children from minority groups and low-income families in certain schools.

(c) To prevent, when possible consistently with the objectives stated in subsection (a) of this section, the resegregation of schools after desegregation has been achieved.

(d) To eliminate any educational ill effects resulting from the concentration of children from minority groups and from low-income families in schools where such concentration persists.

TITLE I—LOCAL RIGHTS AND RESPONSIBILITIES

RIGHT TO TRANSFER

SEC. 101. (a) (1) Subject to paragraph (2), any student in any public school shall have the right, at the beginning of any school year, to transfer from a school to which he has been assigned or would in the regular course be assigned and in which his race is in a majority to a school in which his race is a minority, if the school to which transfer is requested offers education in the grade equivalent to that from which the student transfers.

(2) A local educational agency may postpone a student's privilege to exercise the right granted by subsection (a) for a reasonable period of time while the most rapid

feasible effective measures are taken to alleviate conditions of overcrowding in the school to which transfer is requested.

(b) Transportation which may be required to effectuate the right of transfer under this section shall be proviedd by the local educational agency.

(c) Any person or persons alleging that the right established in subsections (a) and (b) of this section has been denied to him or her individually or to a class of which he or she is a member, or the Attorney General, if he has reasonable cause to believe that any person or class of persons have been denied such right, may bring a civil action in the appropriate district court of the United States for equitable relief, including an application for a permanent or temporary injunction, or other order.

(d) In any action commenced under this section, the court may allow the moving party or parties, other than the United States, a reasonable attorney's fee as part of the costs, if such party or parties prevail in the action. Where the prevailing party is the defendant, the court may allow such prevailing party a reasonable attorney's fee as part of the cost upon a finding that the proceedings were unnecessary to bring about compliance.

EQUAL EDUCATIONAL OPPORTUNITIES

SEC. 102. (a) Where children from minority groups are concentrated in certain schools, local educational agencies shall insure that these students are not denied equal educational opportunities by practices which are less favorable for educational advancement than the practices at schools attended primarily by students of any other race, color, or national origin. Examples of disparities between such schools which may constitute a denial of equal educational opportunities include—

(1) comparative overcrowding of classes, facilities, and activities;

(2) assignment of fewer or less qualified teachers and other professional staff;

(3) provision of less adequate curriculums and extracurricular activities or less adequate opportunities to take advantage of the available activities and services;

(4) provision of less adequate student services such as guidance and counseling, job placement, vocational training, medical services, remedial work;

(5) assigning heavier teaching and other professional assignment to school staff;

(6) maintenance of higher pupil-teacher ratios;

(7) provision of facilities (classrooms, libraries, laboratories, cafeterias, athletic, and extracurricular facilities), instructional equipment and supplies, and textbooks in a comparatively insufficient quantity; and

(8) provision of building, facilities, instructional equipment and supplies, and textbooks which, comparatively, are poorly maintained, outdated, temporary, or otherwise inadequate.

(b) No local educational agency shall adopt any policy or measure which is intended to achieve the separation of children on the basis of race and has that effect.

(c) The Secretary shall issue regulations further setting forth measures to be taken by local educational agencies to come into compliance with this section.

LAWSUITS

SEC. 103. (a) Any person or persons alleging, or the Attorney General if he has reasonable cause to believe, that any policy or measure of a local educational agency violates section 102 of this Act, may bring a civil action in the appropriate United States district court for equitable relief, including an application for a permanent or temporary injunction, or other order. If the court finds that such policy or measure exists, it shall order the rescinding of such policy or measure, and shall order affirmative action to be taken to cure present effects caused by such policy or measure.

(b) In any action commenced under this section, the court may allow the moving party, other than the United States, a reasonable attorney's fee as part of the costs, if such party or parties prevail in the action. Where the prevailing party is the defendant, the court may allow such prevailing party a reasonable attorney's fee as part of the cost upon a finding that the proceedings were unnecessary to bring about compliance.

(c) Any policy or measure which violates section 102 shall also be deemed to constitute a violation of section 601 of the Civil Rights Act of 1964, whether or not a civil action with respect to such violation has been brought under this section.

TITLE II—STATE RESPONSIBILITIES

STATE PLAN

SEC. 201. (a) Each State shall prepare and submit to the Secretary for his approval, in accordance with regulations issued by him, a plan to carry out the purpose of this Act as stated in section 3.

(b) The plans of Virginia and Maryland shall take account of the areas of the District of Columbia nearest to each and shall be worked out in consultation with the local educational agency of the District of Columbia.

ADVISORY COUNCILS AND COMMITTEES

SEC. 202. The plan submitted by each State shall provide for—

(a) the establishment of a State advisory council which shall be appointed by the Governor and which shall—

(1) include as members businessmen, educators, parents, and representatives of the general public, and shall be so constituted that parents of children attending public schools constitute at least a majority of such membership, and that parents of children from minority groups are represented in an approximately proportionate number to the number of minority group children in the school age population of the State;

(2) advise the State educational agency on the development of and policy matters arising in the administration of the State plan submitted pursuant to this title; and

(3) prepare and submit through the State educational agency to the Secretary an annual evaluation report accompanied by such additional comments of the State agency as it deems appropriate, which evaluates the progress made in that year by the State in achieving the purpose of this Act; and

(b) the establishment of local advisory committees which shall—

(1) include as members parents of children attending public schools, and shall be so constituted that parents of children from minority groups are represented in an approximately proportionate num-

ber to the number of minority group children in the school age population of the local educational agency; and

(2) advise the local educational agency on its participation in the State plan.

PROVISIONS OF THE PLAN

SEC. 203. The plan submitted by each State shall—

(a) be submitted to the Secretary by January 30, 1975;

(b) be developed in consultation with local educational agencies and the State advisory council;

(c) (1) define goals consistent with the purpose of this Act as set forth in section 3 and provide for attaining such goals by a date approved by the Secretary, but in no event later than March 30, 1985;

(2) include specific means for attaining such goals, which means may include such features as:

(A) drawing children from the core city into outlying, suburban schools;

(B) redrawing zone boundaries, pairing and clustering schools, establishing educational parks and magnet schools;

(C) providing professional and paraprofessional staff for guidance, counseling, and special services to minority group children in new environments to which they may be assigned or may have transferred;

(D) expanding or altering facilities to accommodate students transferred to new schools;

(E) public education efforts and other community activities in support of new plans, programs, or projects;

(F) work study programs for junior high school children in need of financial assistance to complete their education;

(G) developing and implementing interracial education programs and projects involving the joint participation of minority group and nonminority group children attending different schools, public or private, including extracurricular activities and cooperative exchanges or other arrangements between schools within the same or different school districts;

(H) remedial and other services to meet the special needs of underachieving children, including development and employment of new instructional techniques and materials;

(I) decentralization and diversification of clusters of public schools under community control, but only upon decision by majority vote in the community, and only if the principle of voluntarism is observed so that communities are self-defining, and families that do not wish to form part of a community control system are supported in transferring their children out;

(J) tuition voucher projects for use in public and private nonprofit schools;

(d) assure that in each year of operation of the plan substantial progress will be made toward meeting the purpose of the Act;

(e) specify how additional State financial assistance will be made available to local educational agencies undergoing desegregation pursuant to a court order, a plan approved in accordance with title VI of the Civil Rights Act of 1964, or an order issued by a State agency or official of competent jurisdiction;

(f) specify how programs now funded under the Elementary and Secondary Education Act of 1965, or any other federally funded program for educational enrichment or desegregation assistance, are fitted into and coordinated with operation of the plan;

(g) specify the procedures to be used by the State educational agency in coordinating the efforts of the local educational agencies desegregating (as specified in subsection (e) or voluntarily integrating);

(h) specify what procedures will be used by the State educational agency to assume control (after proper notice and an administrative hearing) of local educational agencies where the State agency finds a clear and systematic pattern of the downgrading of public education by the local educational agency;

(i) specify what procedures will be used by the State educational agency for involving, on an equitable basis, children enrolled in private nonprofit schools in the programs funded under this Act to the extent that their participation will assist in achieving the purpose of the Act; and

(j) assure that the State educational agency will require each local educational agency to report to it annually on its implementation of the State plan, and that the State agency will report annually to the Secretary on the State's overall implementation of its plan.

GRANTS

SEC. 204. (a) (1) There are authorized to be appropriated for carrying out this title not in excess of $100,000,000 for fiscal year 1975, and not in excess of $500,000,000 for fiscal year 1976, and each fiscal year thereafter.

(2) The Secretary shall allot 80 per centum of the sums appropriated under paragraph (1) for a fiscal year among the States so that the amount allotted to each State bears the

same ratio to such 80 per centum of such sums as the aggregate number of minority group children aged five to seventeen, inclusive, in such State bears to the aggregate number of such children in all the States.

(b) From the sum allotted to each State for fiscal year 1975, the Secretary may make a planning grant to the State educational agency and supplementary planning grants to other public and private agencies assisting the State agency, to enable such State to prepare, and prepare for carrying out, its State plan.

(c) From the sum allotted to each State for fiscal year 1976, and each succeeding fiscal year, the Secretary may make grants to the State educational agency for programs to implement the approved State plan.

(d) All sums appropriated under the Elementary and Secondary Education Act of 1965, and all other Federal funds appropriated under programs for educational enrichment or for desegregation assistance shall be allotted to implement the approved plan.

(e) From the 20 per centum of the appropriations under subsection (a) (1) not allotted among the States pursuant to subsection (a) (2) for a fiscal year, the Secretary may make grants to, or contracts with, any public or private agencies which may assist in achieving the purpose of this Act.

(f) No funds granted under this title may be used to supplant State or local educational funds being expended, or that would have been expended, absent the grant, in or for public schools or to assist any private school directly.

ADMINISTRATION OF GRANTS

SEC. 205. (a) The Secretary shall approve any State plan which meets the requirements of section 203, and shall not finally disapprove any such plan without first affording the agency administering the plan reasonable notice and an opportunity for a hearing.

(b) Whenever the Secretary, after reasonable notice and opportunity for a hearing—

(1) disapproves a plan pursuant to subsection (a), or

(2) finds:

(i) that no plan has been submitted by a State,

(ii) that a State plan approved under subsection (a) has been so changed that it no longer complies with the requirements of section 203,

(iii) that in the administration of such a plan there is a failure to comply substantially with any such provisions, or

(iv) that a grantee is in violation of section 204(f),

the Secretary shall notify the grantee that further payments will not be made to the grantee under this title, under title I of the Elementary and Secondary Education Act of 1965, or under title III of the Elementary and Secondary Education Act of 1965 or any other educational enrichment or desegregation assistance program (or, in his discretion, that further payments will be limited to grantees or programs not affected by the failure) until he is satisfied that there will no longer be any failure to comply. Until he is so satisfied, the Secretary shall make no further payments under such titles (or shall limit payments to grantees or programs not affected by the failure).

JUDICIAL REVIEW

SEC. 206. (a) If any State is dissatisfied with the Secretary's final action with respect to the approval of its State plan under section 205(a) or with his final action under section 205(b), such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28, United States Code.

(b) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(c) The court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

TITLE III—GENERAL PROVISIONS

DEFINITIONS

SEC. 301. For purposes of this Act—

(a) The term "minority group" means Negroes, American Indians, Spanish-surnamed Americans, and Orientals.

(b) The term "low-income family" means a family with an annual income of less than $3,000.

(c) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control, or direction, of public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a

State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools, or a combination of local educational agencies.

(d) The term "nonprofit" as applied to an agency, organization, or institution means an agency, organization, or institution owned or operated by one or more nonprofit corporations or associations contributions to which are deductible under section 170(b)(1)(A)(ii) of the Internal Revenue Code and no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(e) The term "school" means a school which provides elementary or secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

(f) The term "Secretary" means the Secretary of Health, Education, and Welfare.

(g) The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law for this purpose.

(h) The term "State" means one of the fifty States or the District of Columbia.

EVALUATION

SEC. 302. Such portion as the Secretary may determine, but not more than 1 per centum, of any appropriation under this Act for any fiscal year shall be available to him under section 204 (e) for evaluation (directly or by grant or contract) of the programs, activities, and projects authorized by this Act.

NATIONAL ADVISORY COUNCIL

SEC. 303. (a) There is hereby established a National Advisory Council on Educational Opportunities, consisting of fifteen members appointed by the President, which shall—

(1) advise the Secretary with respect to the operation of the plans authorized and required by this title, including the preparation of regulations and the development of criteria for the approval of applications; and

(2) review the operation of the plans.

(b) The Secretary shall submit an estimate under the authority of section 401 (c) and part C of the General Education Provisions Act to the Congress for the appropriations necessary for the Council created by subsection (a) to carry out its functions.

Senator Ervin. I think we have had a lot of bungling in this field. The worst example I have seen in a long time, according to the press, is the possibility that the Federal Government will attempt to tell students what colleges they should attend. I read in the press a short time ago that the Department of Health, Education, and Welfare was threatening to take Federal grants or Federal funds away from a predominantly black college in Virginia because it was determined to lack a sufficient proportion of white students attending that college. In other words there was a proposal by one of the great agencies of the U.S. Government that black students and white students should be penalized and denied benefits that Congress had made available because black and white students did not choose to attend a particular institution in sufficient numbers.

That reminded me of a very tragic statement I read many years ago which said it would be shocking if one realized with what little wisdom the Earth is governed.

Mr. Preyer. Mr. Chairman, as you know, that is a matter of great concern in North Carolina right now, the question of integrating higher education. I think some of the stupidities that are about to be committed in that instance are worthy of the kind of treatment that only someone like yourself can give. I am glad you are interested in it.

Senator Ervin. I thought that was probably one of the most absurd proposals I have heard. The Department, since it is called the Department of Health, Education, and Welfare, ought to have a little commonsense and justice. If it is going to withhold those funds I suggest it be spent to educate some of the people who administer that program.

Thank you very much.

Mr. Preyer. Thank you.

Senator Ervin. Our next witness is Mr. William E. Poe, chairman of the Charlotte-Mecklenburg Board of Education.

I want to welcome to the committee William E. Poe of the Charlotte-Mecklenburg school system, and I want to say he has served this school system with great distinction. With all the troubles we have had in the public schools, it takes much patriotism and imagination to do something constructive in the education of the schoolchildren.

TESTIMONY OF WILLIAM POE, CHAIRMAN, CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

Mr. Poe. Thank you, sir.

I want to say we in Mecklenburg are proud of the service rendered by you in the Senate, and we hate to see you step out of that seat although I know you deserve some years of your own.

We are very proud of you in Mecklenburg and I think you know we have always been behind you.

Senator Ervin. Thank you.

Mr. Poe. First let me attempt to set the stage for the remarks to follow with a brief introduction of the Charlotte-Mecklenburg school system and its desegregation problems. We are a countywide, yet largely urban school district with about 77,000 pupils and 104 schools. Almost 34 percent of our pupils are black—a gain of 5 percent over the past 5 years. In the southern and eastern portions of our district, the black student ratio is about 7 percent; in the northern and western portions, the black student ratio is well over 50 percent. This is illustrated on one of the maps I would like to show you in a moment.

Population growth and relocation of residents is continuing to result in more and more physical separation of races in our county. The black population of Charlotte is heavily concentrated in the center and northwest sectors of the city.

Yet, we very likely today have the most fully integrated school system to be found anywhere in the country. The U.S. district court judge, in his first order entered in 1969, began by saying that our district had done more to bring about the desegregation of its schools than any school district he had read about in the reported cases. Since that time, acting under a series of court orders in the now famous *Swann* case, our school board has been compelled to go to greater lengths to bring about prescribed ratios of racial assignments in all of our schools than any other school district that we know about elsewhere in this country. It has been our reluctance to yield voluntarily to court orders which have mandated massive, long distance cross-busing for racial balance in all schools that has earned for us a reputation in some quarters of being a recalcitrant school district not willing to desegregate its schools.

If that be our reputation here, then let me ask you to look more carefully at the facts as they actually exist and not at the allegations of our adversaries in court or indeed at the findings of fact entered by the district judge. The Charlotte-Mecklenburg School District is committed to desegregated public schools and has no desire to return to the dual school system by race which it abandoned at least as early as 1964. At the same time, we submit that the attempt on the part of some Federal judges to order school districts like ours to maintain racial balance within narrow limits in all of our schools, no matter what the cost, inconvenience or impracticality might be, is a self-defeating process that makes education more difficult and cuts off vast areas of support for the public schools.

An attempt to order objectively the observable results of almost 5 years' experience with court-ordered busing in our district will of necessity highlight the negative. There are positives in terms of education, integration and trends in community concern, but evaluation of these is at best subjective. There are no objective measuring devices and there is little consensus. The attempt here is to categorize briefly the observable facts which I believe are apparent to any interested citizen in our country. These facts are as follows:

(1) Our mobile population and instability in assignments of pupils. From 1969 to the present, Charlotte-Mecklenburg has used some version of every pupil assignment plan known to mankind, and even now we are trying to devise a new plan, so far unknown or undiscovered, which will give us that magic status known as "unitary." If that is achieved, our district judge avows, and he has said this several times publicly—that he will retire from the school board. He says that he doesn't know what a unitary school district is, but he thinks he will recognize one when he sees it. We have redrawn and consciously gerrymandered our school district lines to integrate as many schools as possible: we have paired and clustered schools and provided cross-busing to bring black children out of the inner city and white children into the inner city; we have designated satellite areas where no pairing arrangement was possible in order to take heavy concentrations of

black pupils from public housing projects in the city to remote suburban schools where few blacks reside.

We have permitted transfers by choice if the effect promoted racial balance; and last summer we conducted a student assignment lottery because it was the only feasible method of complying with a court order which commanded us to find 600 white high school pupils living in the more affluent southeast portion of our county to attend West Charlotte High School located in a large totally black neighborhood on the northwest perimeter of the city of Charlotte. The school board had proposed to send children from a white residential neighborhood much closer to West Charlotte, but the district judge refused to approve this plan even though the racial balance would have met all requirements. The judge made it clear that he wanted socioeconomic integration as well as racial integration and he boldly suggested that so long as the school board continued to use geographical districts as a basis for school assignments the assignments would be inherently discriminatory.

If the chairman pleases, I would like to go to the map and show you the effect of some of these plans we have used. The three maps we have here represent the pairing arrangement for elementary schools, the satellite arrangement which is taking out large concentrations of inner city children to the suburbs, and then the third is the lottery school assignment plan to West Charlotte Senior High School. All three of these are now in effect in our school system and I will just take a moment, if I may, to show them to you.

The map that is before you has color codes to indicate that, for example, the school here known as University Park, which is represented by a red circle is clustered or paired, the words seem to be synonymous, with four outlying white schools. In order to accomplish a ratio-type integration in these schools students in the University Park Elementary Schools are transported by bus, for 4 years, the first 4 years of school, out to the far outlying schools and in the fifth and sixth grades pupils in the four outlying schools are brought into University Park. There are other groupings or pairings that exist all around the city. Here, for example, is first ward which is a school located almost in the center of Charlotte. It is paired with Lansdowne and Rama Road Elementary Schools, both of which are in white suburban areas located some 10 miles away on the outskirts of the city. This uses up about 40 of our elementary schools in pairing arrangements of that sort.

Now, if I may turn to the next map, this map is referred to as our satellite map. We have quite a few of them, as the Senator will see. But the objective of this approach is to take public housing children, for example—being familiar with Charlotte you know that West Boulevard goes out to the airport—you know there are several housing projects on West Boulevard. There are no schools. In order to provide integrated education for them, if you follow the red lines and arrows you can see these students are taken to a variety of schools out in the perimeter of the county. Another concentration of the black pupils in the midwestern section of Charlotte are taken some 16 miles out here to Baine Elementary School on the outskirts of Mecklenburg County.

Senator ERVIN. If I may interrupt you there. I have received several letters about matters like that. I received one from a couple who wrote me and said they had moved to Charlotte from Statesville. They had deliberately sought a home across the street from an elementary school so their little children could go across the street and attend school. As a result of the court-imposed plan, one of their little girls was placed on a bus and transported a total of 30 miles a day, 15 miles each way, frustrating the exercise of their right as free American citizens to acquire a home at a place selected by them.

Mr. POE. I am afraid that is a true factual situation.

I won't prolong the explanation except to show you in the North Tryon area there is a large concentration in another housing project of black people and they are transported all the way up to Huntersville, which is in the north section of Mecklenburg County. There are some 25 or so of these satellite arrangements which are designed to enable us to get racial-balance-type integration in our schools.

If we look at the third map for just a moment.

I might add parenthetically that mapmaking has become quite an art on the part of our professional staff.

This is the West Charlotte Senior High assignment by lottery plan. As I have already said in my testimony, the district judge insisted last summer when we were told to put more white people into West Charlotte Senior High School, which is located on the northwestern perimeter of the city, that we could not take them from where we thought they should come. The school board had picked an area generally here which was white and the closest white area to West Charlotte and wanted to assign those pupils to West Charlotte. When the plan went to the judge he said he would not permit the assignment of those pupils and he would insist the pupils assigned to West Charlotte come from, and he named five high school areas all located in the area generally described between these two lines on the map. In order to pick those students the board was told to use any fair means of selection that we wanted to devise, including choice by principal, including lottery. Well, no principal wanted to be told to choose people to go to West Charlotte from that area, and we didn't think it was fair to ask them to. After great debate our board decided that the lottery method was the only reasonably fair method we could adopt and we asked our computer people, using what they call cells, computer cells on this map, to select by a completely arbitrary lottery-type selection the pupils who would attend West Charlotte. This is the result. The orange colored squares on this map were selected by computer to attend West Charlotte. You can imagine the complicated mass of busing it takes to transport pupils from each one of these cells over to West Charlotte. Not only did we select by lottery, we were told to put the buses there to take the pupils to school.

Now, if I may go back to the testimony.

Under none of the plans we have used has the impact upon all children and all neighborhoods been the same. Proportionately, more black children have been bused—that is, taken beyond the nearest school and into a neighborhood of the opposite race—than have white children. The mathematics of racial balance, that is twice as many white children as black children, requires this in our district—yet, we are now told that this places an unfair burden on black children. Some white children have not been bused out but have remained at their home school to which black children have been brought from satellite areas—that is, public housing projects. The judge has now called these areas where children attend their neighborhood school white sanctuaries and says that they must be avoided in future pupil assignment plans.

The most difficult task of all has been to find white neighborhoods willing to have their children bused into black neighborhoods to attend school. In several instances, after school assignments have been approved and the racial mix seemed to be in line, sudden and massive movements have taken place causing large subdivisions to change from white to black almost overnight. One development consisting of some 1,700 homes has changed from white to black in the last 2 years, and the change has all but wrecked the delicately balanced racial assignments in the affected schools. Some thought that the area would remain integrated from the housing standpoint, but like other areas in our community, blacks and whites have separated and show little disposition to remain as close neighbors on a permanent basis.

West Charlotte Senior High School, a fine physical plant built in 1962, can house about 1,700 students. As of today 2,600 high school students live closer to this school than any other high school; 2,100 of them are black and 500 are white. To comply with the present court order, we must ship or bus out some 1,500 black students and bring in some 600 white students selected on the basis of nongeographical criteria, and not only that, we must assure the court that the assignment plan which achieves this result is a stable plan—that is, one that cannot be circumvented, by white students in particular. We are presently operating under an order which forbids any change in assignment of a lottery-chosen white student assigned to West Charlotte High even if his family moves away from the area from which he was chosen. This has resulted in some bizarre transportation problems. In one case, we had to assign a driver and bus to pick up one pupil whose family built a new home and moved to the far northerly end of the county, more than 25 miles from West Charlotte Senior High School.

In our system we have more than 500 pupils on the average who change their place of residence each month. We also have a large in-migration which affects school population. It would seem to me that when people move even within the school district that their children should be able to transfer to the school that serves their new home and not have to remain in their former school to be counted in the all-important ratio as a white or a black, and really for no other reason.

Now a few words about loss of student population, sometimes called white flight.

Although Charlotte-Mecklenburg had made considerable progress in desegregating many of its schools on a geographical basis by 1969 without a significant loss of white students, the possibility of losing a great many white students arose immediately when the full impact of the cross-busing, racial balance court order hit our community. On a number of occasions our lawyers attempted to put into the record statistics and exhibits dealing with cities like Washington, D.C.; Detroit, Mich.; Atlanta, Ga.; Newark, N.J.; and other places. The judge rejected all such evidence as being irrelevant to the issues before him.

In 1969 there were more than 84,000 students enrolled in Charlotte-Mecklenburg public schools. Today, even with a new kindergarten program, there are only 77,000—despite continuing growth in our total population. By actual count there are 8,200 fewer white students enrolled today than there were in 1969. Up to 1969 we were growing in school population at the rate of about 2,000 pupils per year—more than half of them white. Conservatively estimating the loss that otherwise would have been a gain from growth alone, we can add 5,000 white pupils to the 8,200 already mentioned, and our total loss in white pupils since the spring of 1969 reaches 13,200 pupils—or to put it another way, we have lost about 20 percent of our white pupils from the public schools.

Senator **Ervin**. What percentage do you say you have lost?

Mr. **Poe**. About 20.

Senator **Ervin**. Isn't that one of the tragic impacts of decrees of this kind? You lose support when those children are withdrawn from public schools. You lose the intellectual and moral support which the public school system needs to have to fulfill its function.

Mr. **Poe**. Unfortunately, most of those you lose are the ones whose parents have been the best supporters up to that point.

Senator **Ervin**. They think an effort merely to integrate the bodies of children is wrong and unwise.

Mr. **Poe**. Yes. Over the same period of time there has been a gain in the number of black pupils.

Where have the white pupils gone? A good many have enrolled in local private schools which are still growing in number, particularly for the southeast half of the county. These are not temporary facilities, there are some fine facilities being constructed in Mecklenburg today. Others have fled to private schools out of State. As one of our administrators has remarked, "freedom of choice" is still available to those students whose parents can afford it.

Although no statistics are available, there is little doubt that our cross-busing situation has had a substantial effect on decisions that are made by out-of-State industries considering the possibility of locating a plant or an office in our city or county.

The trend toward higher black ratio in our schools each year begins to raise the same unanswerable questions for us that cities like Washington, Detroit, Cleveland, Newark, and Atlanta are already facing.

Now a few words about transportation—busing—problems and expense. The total operating cost of transportation has risen from $542,444—1968–69—to over $2 million in the 1973–74 school year. The number of pupils transported per day has risen from 23,000 to 47,000—and while all the dollar and passenger increase, however, is not attributable to cross-busing per se, another court order requiring transportation of all pupils who live a mile and a half from school and the effects of inflation have accounted for some of the increase—it is fair to say that about $1 million annually has been added to our operating budget for transportation to accommodate the court orders relating to integration of schools.

Our bus fleet has been expanded from 267 operating units in 1969 to 516 units in 1974, or an increase of 249 buses which cost Mecklenburg County taxpayers $1½ million. In addition, we are contracting with the local city bus company to provide a substantial portion of the in-city school transportation at an annual cost of about $250,000.

Traditionally, North Carolina has operated its schoolbus fleet safely and economically under a system using student bus drivers. With much longer and more hazardous bus routes and the increased number of drivers needed, there have not been enough student drivers and a corps of adult driver-aides has been added at considerable expense. Also, an imbalance of supply and demand for drivers has lowered the standard of driver performance.

Daily school schedules (opening and closing times) have become dominated by the transportation schedule, including that controlled by the City Coach Co. under its contract. Many schools must open earlier than they otherwise would—some as early as 7:30 a.m., and that is a daylight saving time, and because of the necessity for making double use of buses, elementary school schedules have been controlled by high school schedules—family schedules have been disrupted in many instances.

Now a word about parental and neighborhood support for schools. The fact of wide separation between residence and school is both an inconvenience and a cause of significantly reduced participation in after-school activities by parents and students. PTA organizations in some schools have virtually ceased to exist, although substantial community efforts have been made to keep them alive. After-school club and athletic activity has been curtailed in some schools, while high school varsity athletic programs have been maintained by individual coaches and parents providing transportation to and from practice, especially for black athletes who live long distances from school. One fact evident is that a good coach will find his athletes, no matter how far he has to go to get them. We found that out. Distance from school has become a focal point of objection to "forced busing" with its time waste, as well as diminished safety and discipline while riding the buses.

The academic program. The school program and methodology have had to be modified substantially to respond to the wider spans of ability and aspiration in all schools. The changes have been difficult; to some, change has been slow; to others it has been rapid in either a negative or positive way. A great deal of professional time is being diverted to retraining programs to enable teachers to cope with new and different social and academic relationships.

Discipline, responsibility, security in the school system. Concurrent with the cross-busing of students, there has been a diversion of administrative attention into the areas of discipline, suspension, control and security of persons and property. To many this is seen as caused by the racial and socioeconomic mix; others see more general generational changes as the root cause. Our secondary schools have suffered sporadic outbursts that can be termed disruptions. The central office intervention "task forces"—these are people who would otherwise have duties to perform other than this duty—have been called to the schools 100 times over the past 3 years to help cope with disruption of some degree. Each of the 10 high schools has experienced a major disruption with bodily injury and property damage, and some have experienced two or three. The first year brought high incidence of bomb threats, but these have diminished somewhat this year. The annual count has varied from 175 to 57 so far this school year. Based on reports from teachers and principals there is a varying but continuous level of tension among students and teachers at the secondary schools. The tension can be observed as higher in those schools in the areas farther from the center city to which inner-city students are transported, but a degree of tension is present in all secondary schools.

Now, as to constant community upheaval. For 5 years the busing controversy has dominated the meetings of our school board and has kept the school system and the children it serves in the midst of turmoil and confusion, arising from their not knowing which school they will attend the following September. The court has demanded a stable school assignment plan—one which assures that all schools will remain predominantly white. Parents and children have also demanded a stable plan—one which lets them know where they can expect children to attend school from year to year. These two definitions of stability are obviously in conflict when viewed in the light of our recent history of rapidly changing residential areas and a highly mobile population. The school board has attempted to be responsive to its constituents in order to maintain the highest degree of public support for the school system while at the same time it has sought through previous appeals to determine the scope and substance of its legal duty as interpeted by the courts. This has not been a comfortable posture for people who simply wanted to render a little service to their fellow citizens and offered themselves for election to the school board.

We realize time and again without public support the school system is doomed.

One final comment, as a lawyer and not so much as a school board member.

I find upon reading and rereading the *Swann* decision that although it contains language which seemingly on its face would overrule and reverse some of the orders entered by the district court judge in the *Charlotte-Mecklenburg* case, and the Senator has referred to some of that language this morning—the court in the final analysis retreated to the less precise position that the remedies ordered by Judge McMillan were within the scope of his equitable powers to right a constitutional wrong which he said existed in our school system and they would not interfere with his orders—this ruling put the district court judge in command of our school system for as long as he wants to play that role. Not only does he find all the facts, but he apparently has complete discretion—absent rank abuse—to govern school assignments in our county. In this way, the court through its equity jurisdiction is engaging in the exercise of raw, unbridled power with only a limited possibility of reversal at the appellate level. Perhaps this is one of the built-in dilemmas of our constitutional system, but it strikes me that it is one which ought not to be ignored much longer.

I thank you, sir.

Senator ERVIN. Thank you.

As I stated, I filed an amicus curiae brief in the *Swann* case. I read all the volumes of testimony that had been taken by the district court before so doing. I was compelled to the conclusion that the court found that such racial segregation as existed in the Charlotte-Mecklenburg system was "de facto" segregation because the district court found as a fact that it was impossible to desegregate the schools in the black areas of the city and the northwest areas of Charlotte without busing children. I think on the basis of that there was a finding that such segregation as existed was "de facto" segregation and beyond the power of the Federal court to remedy.

In addition to that, the records showed to me in a most convincing fashion that the school board, as appears on page 5 in effect of the Supreme Court decision in the *Swann* case, did as much by rezoning school attendance lines as can reasonably be accomplished. In other words, the school board had submitted a plan that gerrymandered to a great degree the attendance zones so as to get as great a mixture as possible in the schools. Prior to that time, as I recall, the judge held that the Charlotte-Mecklenburg school system had complied with the requirements. The judge found also that this school system had done more than any other school system of which he had any knowledge to carry out the terms of the *Brown* case.

It seems to me that the fundamental trouble with the idea that the court was wedded to—that every effort, reasonable and unreasonable, should be made, is stated on page 19 of the Supreme Court decision to the effect that efforts must be made to reach a 71–29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others. I think that is the vice which underlies the whole series of the Court orders. The Court was determined to establish an absolute ratio based upon the racial proportions of the inhabitants of the area affected. This was the Court's conception of what constituted a unitary school system even though the Court did recognize there might be exceptions to that.

I said yesterday, I have always reserved the right to criticize court decisions if I thought they were intellectually or constitutionally deficient. Chief Justice Stone said that where courts deal as ours do with important public questions the only protection one has against judicial misinterpretation, even against judicial usurpation is careful scrutiny and comment upon judicial decisions.

I also called attention to a very good man whose birthday was celebrated a few days ago. In commenting on the *Dred Scott* decision, President Lincoln said in substance that this decision is erroneous, it is contrary to such precedents as we have on the subject. I refuse to accept it as a rule for the guidance of the government of the people and will do everything in my power to secure its reversal.

In the *Swann* case, we have a statement of the Court that if the district court had required a specified racial quota, it would have reversed the decision. But, the Court added that racial proportions of the community was a good point to start from. The Supreme Court did not suggest where you went to from there.

If there is anything that the Constitution of the United States was drafted and ratified to establish, it was a government of laws—a government in which the conduct of the people and the conduct of public officials would be governed by certain, constant, uniform laws which the people and those who governed are required to obey rather than the arbitrary, inconstant rule of men who occupy public office.

The decisions in these school cases repudiate, despite much lip service to the notion of equity, the concept that we have a government of laws. We have equal protection clause, which in 1954 meant one thing. Now they say it means exactly the opposite.

There is another astounding thing in this opinion. I was a member of the Senate when they passed the Civil Rights Act of 1954. I know from what the managers of that bill said that that bill was intended to deal with the desegregation of schools in accordance with the decision in the *Brown* case. The decision in the *Brown* case was to the effect, as the Chief Justice I think 23 times directly or by inference states in this opinion, that discrimination in the assignment of children to public schools on the basis of race was prohibited. That was stated to be so by the managers of the bill. The whole debate in the Senate was to that effect. There was no attempt to deal with the "de facto" segregation. Yet, to get around this provision, the Court did a rather remarkable thing. Title IV, section 2000(b) defined what they meant by "desegregation." Congress defined it in very plain words and in complete harmony with the *Brown* case. "Desegregation" means "The assignment of students to public schools and within such schools without regard to their race, color, religion or national origin."

Now, that clearly reveals that the purpose of the Congress in passing that law was to deal with discriminatory segregation, but the Congress did not stop with the finding of what "desegregation" was or is. It went ahead and defined what it is not. It said, "but desegregation shall not mean the assignment of students to public schools to overcome racial imbalance." Well, that is such plain language, it seems to me the Supreme Court of the United States ought to be able to understand it. And yet, in the *Swann* case they totally misconstrued it. They state that the legislative history of title IV indicates that Congress was concerned that the act might be read as creating a right of action under the 14th amendment. In the situation of so-called "de facto" segregation where racial imbalance exists in schools but with no showing this was brought about by discriminatory action by State authorities. The only thing that the Congress was dealing with when it enacted that statute was discriminatory segregation in the assignment of children to public schools on the basis of race.

There was placed on the statute an interpretation that the schools of Mecklenburg County must do something which that act forbade to be done, that is assign children to public schools in order to overcome racial imbalance. All judicial language is not easy to construe. But, if I construe it correctly, the Court held in effect that instead of legislating in respect to the only matter Congress had any power to legislate in respect to—that is, discriminatory assignment of children to schools—that Congress intended to legislate in respect to something it had no constitutional power to have anything whatever to do with.

Now, you spoke of the fact that all of the transportation or busing of children in the Charlotte-Mecklenburg system is not for integration purposes. Hasn't busing been a tool to advance education? Hasn't it been used widely to transport children from their homes to the nearest school which is available to children of their ages and scholastic attainments?

Mr. POE. That has been going on for years, yes sir.

Senator ERVIN. And that is a perfectly wise and necessary use of transportation, isn't it?

Mr. POE. Yes, sir.

Senator ERVIN. You don't have to say anything about this, but I believe that the kind of busing used to overcome racial imbalance is quite a different kind. It is not for the purpose of enlightening the minds of the children, although some of the people who advocate it say so. It is merely for the purpose of integrating their bodies. I don't ask for any comment from you. I am making that assertion myself.

Mr. Poe. Yes, sir.

Senator Ervin. You have had an increase in the number of children being bused from 25,000 to 47,000 in a comparatively short period of time.

Mr. Poe. That is correct.

Senator Ervin. As I recall, under the order of the district court in the *Swann* case, a lot of the transportation required involved very young black children in the primary grades.

Mr. Poe. Well, we are transporting children, I would say, of all ages at this point.

Senator Ervin. I know, but a very considerable number are very small children?

Mr. Poe. Yes, that is correct. The elementary busing of black children is from grades one through four. So they are being transported more than white children of that age.

Senator Ervin. You stated that the cost of busing in the Charlotte-Mecklenburg system now is over $2 million a year?

Mr. Poe. That is the operating cost; yes, sir.

Senator Ervin. What proportion of that would be due to the busing decree as distinguished from what I call educational busing?

Mr. Poe. I estimate in here, and this is the best information I could get from our professional people, that this year, for example, we are spending $2 million, and we estimate that $1 million of that, half of the $2 million, is due to this cross-busing for racial balance.

Senator Ervin. Aren't there other good purposes that money could be used for, such as education?

Mr. Poe. Unfortunately there are, Senator. Each year we present a budget which shows need far in excess of money that we could get. There are many, many places this money could be put that would promote education.

Senator Ervin. I just want to express a legal opinion, and that is this. I think the application of provisions is not always easy, but one of the simplest and most understandable provisions in the Constitution is the equal protection clause. It was designed for a very fine purpose, and that was to keep any State from having one law for one man and another law for another man when the two men are in exactly the same circumstances, or one law for one group of people and another law for another group of people when the two groups were in similar circumstances.

It seems to me that when a Federal court requires a school board to separate the children in a given attendance zone into two groups and requires the school board to say to one group you can attend your neighborhood schools and say to the second group you cannot attend your neighborhood schools that the court is requiring the school board to violate the equal protection clause. It is requiring the school board to do something which the equal protection clause forbids it to do; that is, to treat in a different manner the two groups of children who are similarly situated. I think that is inescapable.

Then these decrees go one step further and command the school board to require the busing of one group of students to schools elsewhere, either to increase the number of children of their race in the schools elsewhere or to decrease the number of children of their race in the neighborhood schools. I do not believe that oceans and oceans and oceans of judicial sophistry can wash out the obvious fact that in so ruling this court is requiring the school board to violate the equal protection clause as it is interpreted in the *Brown* case. It is denying to the children that are being bused the right to attend their neighborhood schools solely on the basis of their race. I hope one of these days we will have sufficient judicial enlightenment for the courts to reach that obvious conclusion.

I want to commend you for your very fine statement, and also for the fact that you have faithfully stayed on the Charlotte-Mecklenburg School Board, have done the very best you could to promote the educational opportunities of Mecklenburg County students of all races under circumstances which I am sure would have tried the patience of a saint.

Mr. POE. Thank you, sir. I appreciate it.

Senator ERVIN. Thank you very much.

The next witness is Mr. James D. Rowe. Mr. Rowe represents the Henrico County Parent Teachers Association. He has been very active in community and educational affairs as a former member of the Lay Advisory Committee in Henrico County, chairman of a number of ad hoc committees on educational affairs, and for these reasons the committee is delighted to welcome him as a witness here today. I want to express to you our deep appreciation for your willingness to come.

TESTIMONY OF JAMES D. ROWE, ATTORNEY, RICHMOND, VA.

Mr. ROWE. Thank you very much, Senator.

I appreciate your characterizing my position correctly. Earlier through inadvertence, Senator Allen referred to me as an attorney for the Richmond city school board. I wish to have that stricken from the record.

Mr. Chairman, members of the committee, I appreciate this opportunity to speak to you briefly on the question of the Constitution and forced busing for the purpose of achieving racial balance. My name is James D. Rowe. I am from the Richmond, Va., metropolitan area and am the father of three school-age children. I am a member of the Henrico County PTA which, as is the case with the national PTA, opposes busing.

RICHMOND METROPOLITAN AREA LITIGATION

Our metropolitan area was the subject of protracted litigation that lasted several years. The thrust of the case was an attempt to take a substantial step beyond the affirmative decisions that have required forced busing within governmental boundaries. An effort was made to consolidate by judicial decree three very large school districts operated by three separate and distinct political subdivisions—the city of Richmond and the counties of Henrico and Chesterfield—into one massive school district with buses running from one end of the metropolitan area to the other.

The decision of the Supreme Court in the *Richmond* case is, of course, a matter of record. The justices split four to four and, thereby, declined to hear an appeal of a circuit court ruling which held that the Constitution did not require consolidation of the three systems.

Thus, the Richmond city schools now operate under a highly complex court decree involving crosstown busing while the counties operate fully integrated, HEW approved, systems within their respective boundaries. In effect, we won our case by the narrowest of margins. Since I am from the county of Henrico, a separate and distinct political subvision, which is not involved in court-ordered busing, it may seem odd that I am testifying.

POTENTIAL IMPACT

Suppose, for the moment, that the case had gone the other way. We can argue and speculate on what the impact would have been. Some results, however, are not debatable. We would have one system comprised of over 100,000 students. I think that is getting too big, but don't take my word, Senator. Take the statement of the city superintendent of schools who was our adversary in the case: "You also reach a point, and I don't know exactly what that point is, some 50, 60, 70,000 students, whereby it becomes unwieldy * * * particularly your curriculum * * *" It is a fact that an adverse decision would have converted a 70- to 75-percent black city system into a permanent white supersystem with the minority always representing one-third of the student population. That, to me, is judicially decreed minority status. Again, let me quote an active participant in the case. Richmond's black vice mayor and I debated this issue publicly. He had misgivings despite his desire to accomplish a noble aim. He said, "We may be creating a monster, but I am willing to risk it." Surely that monster would have come into being if the court had ruled adversely in the *Richmond* case.

DEFINITIVE ACTION IS THE ONLY REAL SOLUTION

During the agony of our undecided court case, it became apparent to the citizens of my area—and I believe the Nation as a whole—that neither the executive nor the judicial branches of the National Government would ever resolve the dilemma in a final and satisfactory manner. In the last analysis, it is obvious that a constitutional resolution of the problem is essential. Being from Thomas Jefferson's State, I do not advocate frequent or easy constitutional amendments. The matters before you are not fly-by-night suggestions. They are the product of some long hard examination of factual results. There is a time to act. I think that time is now. The complex questions presented by unique problems in diverse areas such as Detroit or Richmond or Denver or San Francisco, and so forth, preclude simple equitable solutions. Lengthy congressional enactments and/or voluminous equity decrees, create more problems than they solve. The district court decision in Richmond was 325 pages long. Throughout the Nation, therefore, you find local governments confused and frustrated in their attempts to comply with vague constitutional law, while, at the same time, they try to achieve the undeniable demand of the citizenry for the best possible education of every child in the public school systems. It is time, gentlemen, for a decisive and clear answer. It can start in this subcommittee.

COMPLIANCE DOES NOT PRODUCE GOOD RESULTS

Obviously, busing is not achieving the desired aim. In the Richmond city schools, we have seen discipline break down. More to the point, there is a breakdown in the creation of basic skills. Children, black and white, are simply getting less education. And Lord knows, the city has tried. Its citizens have organized to "make the thing work." School administrators have left no stone unturned. Yet, it isn't working. True, the court-ordered mix is achieved by the buses. Quality education is not. The leading "pro" organization in Richmond has just announced that it wants to go back into court to reduce the amount of busing in the interest of returning to the more productive neighborhood school concept. They appear to be frustrated by the results of compliance with the court order, because the city, as I said, is under an order. The counties are not.

NATIONAL POSTURE HAS CHANGED

When the first court cases were brought and Congress enacted the icebreaking laws, there were those who strongly supported and those who just as strongly opposed. In the middle was a large group which seemed to say, "I don't know, give it a chance." I submit that group has made up its mind. A recent Gallup poll indicates that 1 person in 20, thinks busing is the solution to the problem. The very same poll says that only one in five opposes integration of schools. In my opinion, the vast majority of Americans want an answer that will stop forced busing as the solution to the problem.

PARENTAL SUPPORT IS ESSENTIAL

This Nation has learned on several occasions that no matter how noble the venture, unless the people support it, it is doomed to failure. People do not support busing and it is failing. I sometimes think that those of differing views than mine do not want the people to have a chance to express their objections to the evil of forced busing.

MORE FAR-REACHING CONSEQUENCES

Obviously, we have some problems to solve in America: The core cities, the structure of State and local government, racial inequities, et cetera. Mangling school systems for these purposes is not the solution and recent history bears this out. It is difficult to find a supportable position that asserts that we are making progress in education while negative dissertations pile one on top of the other. In Richmond and Detroit and Denver, we see attempts not just to restructure schools, but to restructure local government. All this is done in the name of improving the education of blacks. You gentlemen are in a better position than I to judge the results. I would respectfully suggest that you do so.

CONGRESSIONAL ROLE

The people see Congress reasserting its historical role. It is in the area of unpopular busing that you have a fine opportunity. The judiciary does not seem anxious to handle case after case and the executive branch is not the appropriate arm for resolving the question. So, I strongly urge you to prohibit forced busing for the purpose of achieving racial balance, and I urge you to do it with dispatch. Constitutional rights should not be vague or hard to understand.

I would like to follow up on the quotation Senator Allen made in his remarks.

The problem is this: The District Court had ruled, and I have some quotations which are very brief, requiring the establishment of a single school system; causing title to all school property to be transferred to the new school board; and requiring the Virginia State Board of Education, within 60 days, to file regulations covering the financial plan of operation. This was the thrust of the court order.

In my sister county of Chesterfield the board of supervisors was having a difficult time, and therefore they passed a resolution in which they said—these are elected officials, Senator—if the members of this board could remain independent to vote in accordance with their collective judgment and will, they would unanimously refuse. But their attorney had advised them that the court order of January 10, 1972, mandatorily directed they cast their votes in favor. Then, the board proceeded to say: now, therefore, acting under duress, coercion and compulsion of the penalties consequent for doing otherwise, we vote the way the judge told us to.

Senator Ervin. They violated Mark Twain's injunction. Mark Twain is reputed to have said, "truth is very precious, use it sparingly." They didn't use it very sparingly.

Mr. Rowe. I am afraid that is true.

I would simply close by hoping and praying that the Senate, in its wisdom, will understand what almost happened in Richmond. I would like to meet the gentleman from Charlotte afterward. I sat back there and said to myself, there but for the grace of God go I. It happened to Charlotte instead of Richmond.

The *Richmond* case, by court record, was not a busing case. The *Richmond* case was a government consolidation case. In Virginia, you have a different scheme. You are either a citizen of Henrico, Chesterfield, or Richmond. If Virginia chooses to structure its government that way we have the right for the time being.

There are cases similar to the situations in Detroit where school districts may read the morning paper and find out they had been through a trial and that they had lost it. They had never been served with the first piece of paper. Fortunately we were served and have been able to defend ourselves.

I thank you for the opportunity to appear.

Senator Ervin. It seems to me that Judge Merhige's decision constitutes a very serious assault on State legislative authority. He attempted to destroy the boundary lines which the State in exercise of its constitutional power had established. The decision attempted to supplant the officials who had been intrusted by the State of Virginia with the exercise of State governmental powers. I just cannot conceive of how a Federal judge ever reaches the point that he is vested with such arbitrary authority as that.

Mr. Rowe. I couldn't agree with you more, Senator.

Once, in a speech that I made on this subject in New York, I had the audacity to review the judge's opinion and grade him. The question was would I give him an A or B or C or F, and in those remarks I said I would give him an I for Incomplete, because, in his terrifying order, he required a lot of steps to be taken in case it was affirmed. The State school board said we will form committees and the committees will be named as are the paragraphs in his order. Chesterfield County objected after 13 or 14 committees had been appointed. They said they had to have another committee. The others said they thought they had enough committees. It was pointed out that the district court, in its great equity decree on how the school system should be run, neglected to mention the word curriculum and it was thought it would be nice if a school system with 100,000 students had a curriculum.

Senator Ervin. The thing that concerns me about that case is not only its impact on subdivisions of the State, but also its impact on State constitutional power in general. I don't see how in the world it wouldn't equally apply to destroying State boundary lines between two or more States.

Mr. Rowe. No question about that. I have some friends up North and I have tried to get them to explain to me the difference between Henrico and the City of Richmond and the District of Columbia and Arlington, for example.

Judge Merhige did mention Hanover County which lies to the north of the city. I have the impression the concept was if we don't have them now we will reach out and get them when the time is right.

Senator Ervin. I can't escape the conviction that it is only a question of degree between Federal courts saying to little children you have got to go to schools that I select and saying to the parents you have got to live in communities that I select in order that we may get this racial balance without so much difficulty.

Mr. Rowe. That is one solution to the problem that I don't advocate, but I guess that would solve the problem.

Senator Ervin. I don't advocate it either, but I think it is a question of degree between those two powers. Both are similar.

Mr. Rowe. I have seen nothing to indicate any Federal judge thought he did not have that power. They just haven't exercised it yet.

Senator Ervin. There is the wise, old saying, that eternal vigilance is the price of liberty. We had better be as vigilant about the judges as the legislators.

Mr. Rowe. As you know, Senator Byrd from the State of Virginia has some ideas on that subject.

Senator Ervin. Thank you for a most illuminating presentation. I am glad you read from the record some of the things Senator Allen omitted because I think they are very significant and unfortunately constitute the truth.

Mr. Rowe. This is true.

Thank you very much, Senator.

Senator Ervin. The committee will stand in recess until 10 a.m. tomorrow when it will meet in room 1318 of the Dirksen Office Building, which is this office building.

[Whereupon, at 12:15 p.m., the committee was recessed to meet again Thursday, February 12, 1974, at 10 a.m.]

BUSING OF SCHOOLCHILDREN

THURSDAY, FEBRUARY 21, 1974

U. S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:20 a.m., in room 1318, Dirksen Senate Office Building, Senator Sam J. Ervin, Jr. (chairman) presiding.

Present: Senator Ervin.

Also present: Senator Cook.

Staff present: William E. Pursley, Jr., chief counsel, Senate Subcommittee on Revision and Codification of Laws.

Senator ERVIN. The committee will come to order.

The first witness this morning is my distinguished colleague who shares with me the honor of representing an area of the country which would be the Garden of Eden if it were not for the forced busing of schoolchildren.

I am delighted to welcome my colleague, Senator Helms, to the committee.

TESTIMONY OF HON. JESSE A. HELMS, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator HELMS. Thank you, Mr. Chairman. It is an honor to appear before this distinguished subcommittee, chaired by my distinguished colleague from the State of North Carolina who has labored so long in the vineyard of wisdom on this subject now before the subcommittee.

Mr. Chairman, I will make it clear at the outset that I support any legislation pathway which will erase or even reduce the burdens of forced busing and other forced integration plans. I also support a constitutional amendment, although that, as the good chairman well knows, may take a lengthy period of time before it can possibly become effective. Many millions of children will be subjected to forced integration plans before this can be done.

That is why I have drawn up S. 2336. This is legislation which, in my judgment, will meet the constitutional and legal objections which some have raised to some of the measures before this subcommittee. I believe this can be passed rapidly and I believe it will be effective.

It is important, Mr. Chairman, and members of the subcommittee, that action be taken now. Congress has become aroused by this issue. As the distinguished chairman is aware, I have brought the busing matter before the Senate three times in recent months. Although my antibusing amendments to the energy bills were not accepted, the gap between the yeas and nays narrowed each time. On the last occasion, the vote was actually 46 to 45 against my amendment. One more vote, only one more vote, Mr. Chairman, would have prevented my amendment from being tabled, and enabled the Senate to act. This shows that sentiment is growing in the Senate, Mr. Chairman, for the kind of measures which this subcommittee is considering. In my judgment, the Senate is ready to accept an antibusing bill. As we know, the House has already passed the Dingell amendment, which was patterned on my amendments, by a substantial margin. Congress, and the country, is ready for relief from forced busing, and we must give it if our children are to receive a good education.

I am very pleased to be here today to talk about one of the important social issues of the day. It is not fashionable to talk about forced busing as a social issue. There are those who focus narrowly upon what happens in a classroom as a result of forced integration schemes, or what does not happen. But anybody who has children caught up in forced busing knows that a lot more than their education is involved.

Education is important, of course. There is plenty of sociological evidence, which I will refer to later in my remarks, that the atmosphere created by forced busing is detrimental to learning in the classroom, that it creates hostility and withdrawal into racial groups and lowers the self-esteem and goals of minority groups. This, of course, is completely counter to the assumptions of the *Brown* decision, which is the root of the forced integration concept. The *Brown* decision was based on the idea that if the races were brought together, they would learn more about each other, and accept each other as equals. But the theory breaks down when compulsion is introduced. Instead of good will, hostility is often generated, or at best it becomes a standoff.

Now we are not just talking about good faith on the part of students and school authorities, or the so-called "will to make forced busing work." Handicaps often can be overcome. The human spirit is indomitable, and can often win against the greatest odds. But on the other hand, it is silly and nonproductive to set up unnecessary hurdles.

Forced integration schemes are an unnecessary hurdle disrupting our communities. The logistics of getting to far-flung schools are a burden on the children. The costs of buying unnecessary vehicles are a burden on the taxpayers. The waste of gasoline is ridiculous in the midst of the energy crisis. As I have pointed out on the floor on numerous occasions, at least 1.1 million gallons of gasoline is wasted on forced busing every year in North Carolina alone, over and above the ordinary busing requirements. At a time when we are talking about longer school days, colder classrooms, and oil shortage holidays, it is nonsense to throw away our energy supplies on unnecessary busing. What good does it do to bus a child across town so he can sit in a cold classroom? With the same energy usage, he could walk to school and sit in a warm classroom, and be warm twice. An approved desegregation plan is of no value when the schools are closed because of the energy shortage.

But these burdens are only what may be called the practical burdens, the burdens of day-to-day living with the system. More insidious are the psychological burdens which are imposed upon a community. The educational system is an integral part of community living. People choose their neighborhoods based upon their own sense of community, the kind of people they want to associate with, the income level they can afford, the friendships and relationships they have had with many other citizens over the years.

A society based upon voluntary choice within the means and desires of individual citizens creates an organic, living society with the vitality that comes from the proud spirit of free men. No human system is perfect, and inequities may be present in such a system, or imagined to be present. Nevertheless, the spirit of freedom develops only when a person thinks that he is doing the best he can within his opportunities. But the spirit of rancor develops when he thinks his situation is thrust upon him arbitrarily and despotically without regard to his desires and abilities.

By using the school system as a tool to attack the organic development of community life, the judicial system, and bureaucrats within the executive branch, are going beyond even what the Supreme Court requires. As I will point out in more detail below, the Supreme Court has said that the school system cannot provide an integrated society when the individual choices of citizens have not produced such a society. The only requirement put forward by the Supreme Court is that school officials do not discriminate in pupil assignment or in manipulation of pupil assignment policies. This is complicated by the doctrine that school authorities must affirmatively make up for past discrimination, that is, assignment by race according to quotas and other methods so that the result is a relatively even mix of the races throughout the school system.

In my bill, as I explain in detail below, limitations would be put upon the length of time in which this so-called remedy for past discrimination can be applied. It does not restrict the judiciary's powers, except in the length of time the remedy can be applied. It sets a reasonable period of one school year. Thereafter, public school jurisdiction would be returned to the locality.

My bill set up four criteria, any one of which would define a unitary school system. They are criteria which most of the southern school districts under desegregation plans could meet almost immediately. Many northern school districts would also get instant relief. Some systems, which are just now undergoing desegregation orders, or are about to, would have to wait at least a year for relief, but they would have the satisfaction of knowing that the end is in sight, and not arbitrary.

Mr. Chairman, my bill has been endorsed by school systems and educators from every section of the country, North, South, East, and West. I would like to submit for the printed record a number of letters from such authorities endorsing my bill after careful study.

These come from all over the country, including our own State, Mr. Chairman: The superintendent of school instruction in Johnston County, Hanover County, the mayor of Durham, and the Governor of Virginia, the mayor of Hampton, Va., the mayor of Vallejo, Calif., the Governor of Arkansas.

In any case, these letters come from all over the country.

Senator ERVIN. The letters will be received and printed in the record as part of the record unless you wish to read them.

Senator HELMS. No, sir. I think that would unduly consume the subcommittee's time.

[The information referred to follows:]

OFFICE OF SUPERINTENDENT PUBLIC INSTRUCTION, JOHNSTON COUNTY,
Smithfield, N.C., August 15, 1973.

Hon. JESSE HELMS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HELMS: I wish to thank you for your letter dated August 8 and the copy of the bill you introduced in the Senate on August 3.

This bill appears to have great merit, especially for the states outside the south.

An area in which you can be of valuable assistance to our school system and many others in North Carolina is in reference to the problem which I wrote your office several weeks ago. In brief the problem is this. Congress appropriates funds for schools such as ESAP and then HEW sets up their own rules and regulations in such a manner that it is extremely tedious and difficult to obtain the money appropriated. The officials in the Atlanta Office and apparently in the Washington Office resort to extreme methods designed to turn down applications to the extent of going back from six to eight years and charging that someone was treated unfairly when they have no evidence to support their charge and also enter into the employment of peronnel quotas that are difficult to meet. Also, they wish to determine the membership of various classes on strict racial ratio without reference to sound educational planning. Local control and local planning along the line of sound educational planning is extremely difficult when one makes an effort to comply with their guidelines.

Sincerely yours,

E. S. SIMPSON, *Superintendent.*

OFFICE OF THE MAYOR,
Wilmington, N.C., September 12, 1973.

Hon. JESSE HELMS,
U.S. Senator, Committee on Aeronautical and Space Sciences,
Washington, D.C.

DEAR SENATOR HELMS: Your letter describing the Public School Jurisdiction Act of 1973 (S. 2336) appears to be a vast improvement and I am very happy that you introduced this on August 23rd. It should prove most helpful to children, teachers, and parents and if you will advise us of any particular way we may support this, we will be happy to do so.

Your effort in this vital area is most appreciated by most people and we look forward to better days as a result.

With best wishes, I am,

Sincerely,

JOHN C. SYMMES, *Councilman.*

OFFICE OF THE MAYOR,
Durham, N.C., September 4, 1973.

Hon. JESSE HELMS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HELMS: I have your letter of August 14, 1973, requesting that I review the proposed Public School Jurisdiction Act of 1973 (S. 2336). I have read the materials and believe that the proposed legislation has a great deal of merit.

As the father of five children, I am more concerned about them being uprooted from a school situation movement than I am about integration. If your legislation can once and for all stabilize the movement of children, then I would be enthusiastic for it.

Sincerely,

JAMES R. HAWKINS, *Mayor.*

COMMONWEALTH OF VIRGINIA, OFFICE OF THE GOVERNOR,
Richmond, Va., August 23, 1973.

Hon. JESSE HELMS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HELMS: Your letter describing the Public School Jurisdiction Act of 1973 arrived in my absence from Richmond. I appreciate your thoughtfulness in bringing this proposed legislation to my attention.

Certainly, legislation which would alleviate the frustrations and time-consuming problems of parents and school administrators alike would be of great benefit to everyone. The resolution of such problems would also help us, in Virginia, to realize our Constitutional mandate for quality education for our total school population. Of course, a desegregated school system must not be allowed to return to a segregated status.

Best wishes.

Cordially,

LINWOOD HOLTON, *Governor.*

OFFICE OF THE MAYOR,
Hampton, Va., August 28, 1973.

Hon. JESSE HELMS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HELMS: Thank you for your letter of August 15, 1973, with enclosed copies of your proposed bill dealing with the subject of busing of the public school children.

The issue of busing has occupied our attention here at Hampton as well as in practically every other community in Virginia, and it is certainly one of the great challenges of our day which will be solved only through the application of the best thinking of many to the problem.

I commend you on your efforts, together with my good friend Bill Scott of Virginia, in this regard.

Yours very truly,

DAVID N. MONTAGUE, *Mayor.*

VALLEJO, CALIF., *August 29, 1973.*

Hon. JESSE HELMS,
Senator, U.S. Senate,
Washington, D.C.

DEAR SENATOR HELMS: I have read the material you sent on the Public School Jurisdiction act of 1973 (S. 2336).

I favor local jurisdiction in school operation.

Neither ethnic people nor Caucasians are happy with enforced busing.

People purchase homes near schools so their children will be within walking distance of a school for safety reasons. A Mother does not feel comfortable with her children bussed across town.

I believe that if neighborhoods are integrated as they are today, the schools will be integrated in the same proportion as the neighborhood.

Good teachers teach the same curriculum no matter what the class composition is.

Mandatory regulations are breaking down the public school system by arbitrary demands not desired by the citizenry and we are breaking down the foundation of America, happy families, by required bussing causing anxiety in the homes and frustration.

I certainly believe your Bill S–2336 is a good bill and a step forward in the highly controversial matter of busing.

Sincerely,

FLORENCE E. DOUGLAS, *Mayor.*

OFFICE OF THE GOVERNOR,
Little Rock, Ark., August 15, 1973.

Hon. JESSE HELMS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HELMS: Thank you for your letter of August 8 with the enclosed packet describing the Public School Jurisdiction Act of 1973 (S. 2336). Obviously, a great deal of talent and hard work have gone into this piece of legislation, and I look forward to a report on it from my Department of Education. I appreciate the opportunity to study your proposal and respond with suggestions.

Kindest regards.

Sincerely,

DALE BUMPERS, *Governor.*

GOVERNOR'S OFFICE,
Sacramento, Calif., September 11, 1973.

Hon. JESSE HELMS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HELMS: Thank you for giving me the opportunity to review your proposed Public School Jurisdiction Act of 1973 (S. 2336).

As you know, I strongly advocate the principle of local autonomy, which I believe your proposal emphasizes. I look forward to studying it carefully to consider its effect on the people of the State of California.

Best regards.

Sincerely,

RONALD REAGAN, *Governor.*

DEPARTMENT OF PUBLIC INSTRUCTION,
Bismarck, N. Dak., August 24, 1973.

Hon. JESSE HELMS,
U.S. Senate,
Committee on Agriculture and Forestry,
Washington, D.C.

DEAR SENATOR HELMS: We have considered the material describing the Public School Jurisdiction Act of 1973 (S. 2336) which you introduced on August 3 and arrived at the conclusion that it appears to offer a solution to the turmoil brought about by the court-ordered desegregation.

At the present time there seems to be no legislation to guide the courts in this respect other than the varying interpretations given to the fourteenth amendment.

Also, as indicated in the summary, the decisions by the courts in our opinion seem to be quite narrow while press interpretations seem broad. Now this is only our humble evaluation of the situation.

We believe your legislation is good in its proposing four definitions of a unitary school system. This should eliminate the need for court-ordered processes.

From our point of view, the research is good, the justification well stated, and the legislation clear. I think the bill is worthy of support.

Yours sincerely,

M. F. PETERSON, *Superintendent.*

DEPARTMENT OF EDUCATION,
Columbia, S.C., September 19, 1973.

Hon. JESSE HELMS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HELMS: I am pleased to respond to your request that I review and comment on the Public School Jurisdiction Act of 1973 (S. 2336) which you introduced on August 3. Members of my legal research staff have studied the Act and report that it is legally sound and will withstand any legal challenge. They also note its merit in providing relief of the tremendous burden upon the federal courts.

From an administrator's standpoint, the proposed act addresses a fundamental question that has developed in the wake of Civil Rights litigation in the Southeast: At what point and by what measure will a political subdivision be judged to have erased all vestiges of *de jure* segregation? I recognize that the proposed act has universal application to cases arising out of both *de jure* and *de facto* segregation but it is the former that presents unique problems to us. I appreciate your efforts to legally define a "unitary school system" with all its implications for resolving administrative and program problems within the system of public education.

Sincerely yours,

CYRIL B. BUSBEE,
State Superintendent of Education.

OFFICE OF THE CITY COMMISSION,
Pompano Beach, Fla., August 24, 1973.

Hon. JESSE HELMS,
U.S. Senator, Senate Office Building,
Washington, D.C.

DEAR SENATOR HELMS: We have received the packet of material describing the Public School Jurisdiction Act of 1973 (S 2336) and I have reviewed this bill. You have my whole-hearted support, as well as that of the majority of the citizens in our City, in our County and in our State. They would like to see a bill of this kind passed by Congress, so that we can emerge from the muck and mire and the cost of trying to live up to what is known as the unitary school system.

Best of luck in your fight—wish I could aid you personally.

Sincerely yours,

WILLIAM J. ALSDORF, *Mayor.*

OFFICE OF THE GOVERNOR,
Phoenix, Ariz., August 29, 1973.

Hon. JESSE HELMS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HELMS: Thank you so much for sending me the packet of materials describing the Public School Jurisdiction Act of 1973. A member of my staff has reviewed the proposed legislation and I am advised that it has much merit.

I share your deep concern over the recent trend of court decisions which seem to directly encroach upon the traditional notion of local control over education. The damage which these decisions may have caused to our young people is as yet still undetermined but I am persuaded that when the final statistics are in, they will horrify even the most committed social planner. We simply cannot afford to sacrifice the health of our young people and our communities at large for the sake of some sterile, artificial concept of racial balance.

It is for these reasons that I wish to express my support for S 2336 and am today urging that Arizona's Congressional Delegation join me in that support. I believe that your legislation represents an effective response to our current dilemma.

Again, thank you for sending the information to me and please accept my best wishes and continued support in this endeavor.

Yours sincerely,

JACK WILLIAMS, *Governor.*

FRESNO UNIFIED SCHOOL DISTRICT,
Fresno, Calif., September 11, 1973.

Hon. JESSE HELMS,
Senate Office Building,
Washington, D.C.

DEAR SENATOR HELMS: On August 14, 1973, you addressed a communication to the Honorable Ted Wills, Mayor of the City of Fresno, including information relating to the Public Schools Jurisdiction Act of 1973 sponsored by you. Mayor Wills forwarded that communication and the material to me for my review and response.

I am very grateful to Mayor Wills for forwarding this material to me, because I am pleased and excited about the proposed legislation. I have studied the material carefully and discussed it with my associates. We are of the opinion that this is the best effort yet to bring order to the unfortunate chaos of segregation, desegregation, and integration efforts. I urge you to move with dispatch in securing passage of this very important appropriate and necessary legislation.

For your information, I am enclosing a copy of a letter which I have directed to Senators Tunnel and Cranston, and to my own Congressman, Bernie Sisk, and a personal friend, Del Clawson. Again, best wishes.

Sincerely,

ARNOLD FINCH, *Superintendent.*

DEPARTMENT OF PUBLIC INSTRUCTION,
Dover, Del., August 20, 1973.

Hon. JESSE HELMS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HELMS: I am writing this letter in response to yours of August 8, 1973 in which you presented a packet of materials describing the *Public School Jurisdiction Act of 1973* (S. 2336) and invited my comment or support as the case may be. Several members of our staff have reviewed your proposal and have pointed out to me instances in which such a law would have been of service to the Delaware school system.

In your own research you may have come across the classic case from our own State. In a Civil Action No. 1816–1822 under the heading of "Evans vs Buchanan" in the United States District Court for the District of Delaware, we had a ruling on June 26, 1961 relating to the desegregation of our schools. (Until that time Delaware was not only segregated but was unique among the officially segregated states in that we had two series of school boards and school districts throughout the State.) In your discussion of S. 2336 you point out that courts have permitted cases to stand open or to be reopened. In the case of "Evans vs Buchanan" the court reserved the right to reopen and thus on about July 27, 1971 attorneys did file to reopen for the purpose of adding parties plaintiff and parties defendant. We are now in preparation in behalf of the State of Delaware to defend ourselves in this newly opened case.

Our case is similar to those referred to in your speech before the Congress in that housing characteristics in the Wilmington School District have changed since 1961. In fact, they have changed even more, recently. In 1965 to '67 following the enactment of the Civil Rights Act all Delaware school districts were found in compliance with the new federal Act and thus moved forward thinking that the situation was settled for all of our State.

It would appear that had the Public School Jurisdiction Act been a fact during the past several years in Delaware we would not now again be in a disruption, the cause of which we do not fully comprehend. It can be a bit embarrassing to think as a school official you have done everything the law or the court is requiring and are in compliance and then be served with a reopened suit.

I take this opportunity to give my endorsement to the proposals you are making and in turn invite you or members of your staff to inquire further through my office into our own situation if that will be of benefit to you. You may, of course, wish to make further inquiry through our own Senior Senator William Roth or our Junior Senator Joseph Biden.

Sincerely yours,

KENNETH C. MADDEN, *State Superintendent.*

SHEBOYGAN, WIS., *August 22, 1973.*

Hon. JESSE HELMS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HELMS: Roger Schneider is no longer the Mayor of Sheboygan as of April, 1973, but I would be more than happy to answer your letter, being the newly elected Mayor of Sheboygan.

I agree with the legislation you have introduced. We do not have a racial problem of any sort in Sheboygan but the day may come when we will, but either way, I feel to bus for the sake of racial equality is wrong. We as cities are losing local control and I am totally against that. Busing disrupts families, no matter what color, and also disrupts the students.

Let us return to grass roots control of local government. I am sure we are all responsible community leaders who will do what is best for all people.

Respectfully,

RICHARD W. SUSCHA, *Mayor.*

Office of the Mayor,
Texas City, Tex., August 24, 1973.

Hon. Jesse Helms,
U.S. Senate,
Washington, D.C.

Dear Senator: I want to thank you for your letter of August 14, 1973, and enclosures concerning the Public School Jurisdiction Act of 1973 (S. 2336) and I have read it with great interest.

I am entirely in accord with this legislation and sincerely hope that Congress will speedily enact it.

Thank you very much for allowing me the privilege of reviewing this material and expressing my views.

Sincerely,

Emmett F. Lowry, *Mayor.*

Senator Helms. Mr. Chairman, I also have a question and answer sheet which covers the issues more often raised in connection with S. 2336, and I would like to submit that for the printed record also.

Senator Ervin. That will be received and printed in the record as part of the record.

[The information referred to follows:]

QUESTIONS AND ANSWERS ON THE PROPOSED PUBLIC SCHOOL JURISDICTION ACT OF 1973

Question 1. What does the Public School Jurisdiction Act do?

Answer. The Public School Jurisdiction Act provides a statutory basis for a public school system to meet its Constitutional obligations to establish or maintain a unitary school system under currently acceptable definitions within a reasonable period of time. Once these obligations have been met, no Federal court will henceforth have jurisdiction over that system for the purpose of desegregation.

Question 2. Who decides that the obligation has been met?

Answer. The same court issuing an order submits it to a jury for determination as a question of fact, or the appropriate Appeals Court thereof.

Question 3. What definitions are used?

Answer. The definitions are essentially those in current use:

A unitary school system is:

(1) Any system that is under a court-ordered plan—i.e., all current court determinations qualify. Similarly, any system complying with an HEW-approved plan is a unitary system for the purposes of this Act.

(2) Any system that has been found by a Federal court to be in compliance with the U.S. Constitution and laws—i.e., any system that has successfully defended itself against charges of discrimination.

(3) Any system that has been found by a Federal court to have set up its geographic attendance zones without the intent to discriminate, and not to have altered them except to meet increases or decreases in population.

(4) In addition, a formula is proposed as a benchmark for integration plans. A unitary system would be one in which not less than two-thirds of the schools each have a percentage of each race which is not less than one-third of their percentage, respectively, in the school population taken as a whole.

Question 4. How can we be sure that a school system won't go back to discrimination once it is released from Federal jurisdiction?

Answer. Because the Supreme Court has held that discrimination violates the U.S. Constitution and laws. Furthermore, the Public School Jurisdiction Act forbids any changes in pupil assignment for the purpose of discrimination.

Question 5. What redress is there if a school system lapses into discrimination?

Answer. Plaintiffs have the full apparatus of the State courts, with final appeal to the Supreme Court of the United States.

Question 6. Doesn't the termination of Federal jurisdiction unconstitutionally restrict the right of due process?

Answer. No. Every student or parent in every public school system has had or will have the right to bring his system into the Federal courts at least once if it is not a unitary system under the definitions of the Public School Jurisdiction Act. The Public School Jurisdiction Act simply imposes a reasonable limitation upon the jurisdiction of the lower Federal Courts. A plaintiff will always have the full range of State Courts open to him, including appeal to the U.S. Supreme Court.

Question 7. Will the Public School Jurisdiction Act be upheld by the Supreme Court?

Answer. Yes. The Public School Jurisdiction Act takes as its starting point HEW and court orders currently in effect. It is wholly within the power of Congress to provide a reasonable statutory basis for enforcement under the enforcement section of the Fourteenth Amendment. Due process is not denied because the avenue of the State court is left open, with appeal to the U.S. Supreme Court, as well as original jurisdiction in the first instance with the Federal courts. Furthermore, the Public School Jurisdiction Act does not allow reversion for the purpose of discrimination. If racial imbalance occurs as a result of shifting population patterns, or as a result of the free choice of parents, the School Board is not responsible under the Constitution. The Supreme Court in the *Green* Case refused to rule against freedom of choice plans as such. The Public School Jurisdiction Act purges the State of the taint of past actions in operating a dual system, eliminating the need for indefinite "compensatory action" for past actions under the dual system.

Question 8. Why does the bill require that a unitary plan be in effect "for one full school year"?

Answer. Because some systems operate on a nine-month basis, and others operate on a twelve-month basis. Specification of a calendar year would cut across equitable planning for each.

Question 9. Is "one full school year" sufficient to create a presumption that the vestiges of a dual system have been eliminated?

Answer. Yes. Yes, Congress can create whatever legal presumption it feels is administratively convenient and reasonable. Congress created such a presumption in the Voting Rights Act of 1964 when it set up Federal jurisdiction over voter registration and elections for one year longer than the quadriennial Presidential elections. School administration, however, changes with the annual influx of new students, and one year is an appropriate administrative unit.

Question 10. Does the Public School Jurisdiction Act outlaw busing?

Answer. No. The Public School Jurisdiction Act approves whatever integration plans are currently imposed by court order, including those which require busing. Once a school system has met the definition of a unitary system, it can employ any pupil assignment method it chooses, so long as it does not do so for the purpose of discriminating. The issue of busing will then revert to a local issue, a matter to be decided between the school board members and their constituency.

Question 11. Does the Public School Jurisdiction Act permit "freedom of choice" assignment plans?

Answer. The Public School Jurisdiction Act permits any assignment plan which is not adopted for the purpose of discrimination. In the *Green* case, the Supreme Court specifically refused to rule against freedom of choice plans as such. Presumably, some would be permitted, others would not.

Question 12. Will the Public School Jurisdiction Act "roll back" the gains of the civil rights movement?

Answer. No. Insofar as the civil rights movement has made real progress in the hearts of the people, to the same extent will progress be retained under the Public School Jurisdiction Act. In the long run, the Public School Jurisdiction Act represents real progress because it places the states in a neutral position as regards school assignment. Reforms which are freely accepted by the people represent a more solid accomplishment. Discrimination remains outlawed by the Fourteenth Amendment; the Public School Jurisdiction Act merely regulates the widely varying interpretations of what discrimination consists.

Question 13. Will the Public School Jurisdiction Act permit children now attending superior schools under busing to be sent back to the inferior schools they formerly attended?

Answer. No. A special clause safeguards the right of any child to receive transportation and assignment to the school he now attends despite any assignment plan that might be subsequently adopted by the School Board. Whether this option is exercised is up to the parent.

Question 14. Will the Public School Jurisdiction Act apply with equal effect in the North as well as in the South?

Answer. Yes. The Public School Jurisdiction Act addresses itself both to *de jure* and *de facto* situations. If a Federal court finds that discrimination through State action has occurred in the North, then the judge can issue appropriate orders setting up a unitary school system under the statutory definitions. When that judge or an appeals court finds that a unitary school system has been in effect for one year, the situation reverts back to school board control.

Question 15. How soon will the Public School Jurisdiction Act bring relief to bused children and their parents?

Answer. As soon as the court finds that the school system has been a unitary school system for one full school year. For school systems that have already been under court orders for more than a year, this finding could take place on the day that the Act is signed into law. Actual relief would follow just as soon as the local school board adopted an appropriate school assignment plan of its own choosing. The speed with which this is done is a matter of local concern and local constituencies.

Question 16. How can we be sure that a court issuing an order will act to end its own jurisdiction in a case?

Answer. Application to end jurisdiction can be made by any state authority or local educational agency, or any affected citizen. Under the law, the judge must reopen the order and submit it to a jury to make the determination whether the system has been a unitary system for the required period of time. This is a simple question of fact, amounting to whether or not the schools have complied with the judge's own order for a school year. If the determination is adverse, the question may be taken to the appropriate appeals court.

Question 17. Will the Public School Jurisdiction Act achieve desegregation?

Answer. The Public School Jurisdiction Act does not address itself to the problem of desegregation. The Public School Jurisdiction Act addresses itself to the problem outlined in the *Swann* case by Chief Justice Burger:

"The constant theme and thrust of every holding from *Brown I* to date is that State-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause. The remedy commanded was to dismantle dual school systems.

"We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from *Brown I* to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage . . .

"Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools." [402 US 1 at page 22]

The Public School Jurisdiction Act provides objective criteria for the elimination of dual school systems, thereby insulating present State action that does not discriminate from the taint of past State action that did.

Question 18. Does the Public School Jurisdiction Act restrict the remedies available to a plaintiff whose rights have been abused under the Fourteenth Amendment?

Answer. No. The remedies would be exactly the same as at present.

Question 19. Would the Public School Jurisdiction Act eliminate busing across boundary lines of political subdivisions?

Answer. Yes, except in a rare case where it might be proved in court that a political boundary line was drawn for the purpose of segregating schools. Most communities doubtless could show that their boundaries are historic and were drawn for reasons not associated with an intent to segregate the schools. The fact that segregation occurred along boundary lines for other reasons would be irrelevant to the Constitutional duty to eliminate dual systems.

Question 20. Would the Public School Jurisdiction Act preserve the neighborhood school?

Answer. After jurisdiction is returned to the public school agency, the public school system can do as it pleases, so long as it does not discriminate. Given the generally prevailing sentiments of most people, black or white, the Public School Jurisdiction Act would create a positive environment which would gradually eliminate school desegregation jurisdiction in the Federal courts, return control of the school systems to State and local authorities and eliminate the great bulk of cross-zone racial balance busing. Experience seems to indicate that public dissatisfaction with busing is as characteristic of the black community as of the white. The neighborhood school assignment system seems to be the preferred choice of the great majority of American families. In terms of educational improvement, a shift to such a basis would eliminate the major burden of busing expense which deprives students of the greater educational opportunities available in terms of improved physical plant and equipment, and special teaching assistance which the saving of such busing costs could make possible.

Senator HELMS. Finally, Mr. Chairman, I would like to go into detail about the legal fine points and the nuances of my bill, but it is rather lengthy and I realize that the time here is short, but I would like to submit the rest of my statement so that it can be printed in the subcommittee record as though read.

Senator ERVIN. It will be printed in full and embodied in the record.

[The prepared statement of Senator Helms follows:]

PREPARED STATEMENT OF HON. JESSE A. HELMS, U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

I. THE NATURE OF THE PROBLEM

In framing a remedy for the problem of educational disruption through court orders to achieve racial balance, we must focus precisely upon the nature of the problem, the restraints of the Constitution as currently interpreted by the Supreme Court, and the practical effects of the solutions proposed. Moreover, we want a remedy that will work, and work *now*.

A further complication is that such a remedy must be universally applicable in cases arising both out of *de jure* and *de facto* segregation. Since the Denver decision it may be assumed that court orders will now be issued in geographic areas where it had formerly been assumed that segregated schools were the result of *de facto* situations. The mere absence in the past of legislation or regulations requiring the separation of students by race no longer protects school systems outside the South from assault through the courts. It is urgent therefore that both North and South join in framing a remedy.

Nor can a legislative remedy deal directly with the desire of most people for neighborhood and community schools, and their distaste for court-imposed busing and other mandatory assignment plans and integration devices. I believe that any attempt to restrict the hands of the courts would ultimately be set aside, even though I disagree with the basic premise the courts are using. It would be deeply disappointing to pass a bill providing relief against busing for racial balance only to have it thrown out by the courts.

Finally, our remedy must be a solution that can be supported in good conscience by all men of good will, whatever their political persuasion. We must not forget that the ultimate aim of relief legislation is to promote good community relations and a wholesome atmosphere for sound education. The research report by Harvard sociologist David J. Armor ("The Evidence on Busing" in *The Public Interest*, No. 28, Summer, 1972) and the subsequent discussions clearly demonstrate that the sociology of mandatory integration without freedom of choice has proven to be either erroneous or much more complex than formerly imagined. It does nothing to improve relationships between the races or academic achievement; in fact the evidence is that it engenders hostility and lowers self-esteem and achievement. Until our Constitutional interpretation can be brought into line with reality, we must take legislative steps to foreclose the harm being done to the children.

If such steps are to survive a court test, they must not violate the internal logic of the current mythology attributed to the Fourteenth Amendment. We must focus the issue more narrowly upon what the courts have decided, not upon what we think they have decided, or what we would like them to decide. Changing judicial thinking is a process of years, even if a Constitutional Amendment were passed over night. The only ready remedy is one written within the grammar of recent court decisions. And contrary to the popular impression, the major court decisions—although sweeping in their effects—have been quite narrowly defined.

II. AFFIRMATIVE ACTION TO ACHIEVE RACIAL BALANCE

Although "busing" gets the headlines, there are many other techniques also prescribed by courts to achieve what is commonly called "a racial balance." These other techniques are just as disruptive—some even more so—of the organic patterns of community development. These techniques include pairing of schools, reorganization of junior and senior high schools, building of new schools, gerrymandering of attendance zones, and other devices apparently intended to create a racial balance in each school. Yet the common impression that the courts have required a racial balance as an end in itself is misleading. On the contrary, the United States Supreme Court has never required that a school system must have a racial balance for its own sake. In specific situations, however, the Court has upheld orders that are weighted heavily on the side of accomplishing in each school of the system a racial distribution that approximates the racial balance of the locality.

Such orders have been generally issued by the lower courts under their equity powers, usually in the form of decrees or orders of a continuing quality which retain jurisdiction in the courts without limit of time or circumstances. Civil rights cases and in particular school cases have created a special form of Constitutional interpretation. Until such cases came to the courts, the Constitution was viewed as a prohibitory instrument forbidding discrimination under "state action." The lower Federal courts, in particular, have devised an affirmative or "compensatory" interpretation of the Constitution on the ground that preexisting deprivation of Constitutional right must be affirmatively adjusted to a given point of defined equality before the normal Constitutional limits can be restored.

In effect, then, when the Supreme Court is upholding a lower court order that requires some affirmative action—in the form of busing, pairing, zoning, etc.—it is requiring the school authorities to demonstrate that the State is no longer encouraging segregation. In order to prove that the past practices which resulted in segregation and are now declared unconstitutional have been abandoned, the school authorities must take steps to achieve the uniform racial distribution that presumably would have resulted had it not been for past State action. In short, the Court does not hold that it is the Constitution that requires a uniform racial distribution; it is the doctrine of equity that requires busing and similar artificial steps to achieve racial balance until a supposedly normal state of Constitutional rights can be restored.

For example, in approving the District Court's formula for a racial balance of 71%-29%, the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*, specifically called it "a useful starting point in shaping a remedy to correct past Constitutional violations." It was a starting point, not an end in itself. The Supreme Court found that, "in sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court."

These are subtle distinctions which are of no comfort to parents who find their children's lives disrupted and their educational achievement threatened by the instability and social chaos which so frequently follows such court orders. I strongly dissent from the fine-spun Constitutional theory that invents momentous new doctrines of "affirmative action" out of whole cloth. Yet we must use as our starting point the fact that these theories are the prevailing law and that there is little hope that they will be overturned in the near future. Our legislative remedy must be framed out of the same distinctions.

III. THE REQUIREMENT FOR A UNITARY SCHOOL SYSTEM

If racial balance is not the end sought by present Constitutional interpretation, then what is that end? In judicial language, the requirement is that a State, under the recent interpretations of the Fourteenth Amendment, must convert any "dual school system" into a "unitary school system." The Supreme Court has emphasized this over and over.

In the pivotal *Green* decision, the Court said:

"The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about." [391 US 430 at 436; 20 Law Ed 2nd 716 at 722; 88SCt 1689 at 1693]

Referring back to *Brown II*, the Court's opinion in *Green* was very specific:

"School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated *root* and *branch*." [391 US 430 at 437; 20 Law Ed 2nd 716 at 723; 88SCt 1689 at 1694]

Unfortunately, the phrase "a unitary system" has never been defined. Yet we can deduce the Court's concept from the way it was handled in the *Swann* opinion. There we find that "the objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." Over and over again, *Swann* deals with the problem of racial composition strictly in accord with whether or not the pattern was "state-imposed."

"The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause. The remedy commanded was to dismantle dual school systems." [402 US 1 at 22; 28 Law Ed 2nd at 570; 91SCt 1267 at 1279]

And again, the Court narrowly defined its mission to include only state-sanctioned discrimination in schools, not discrimination which might arise from other factors:

"We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with the myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from *Brown I* to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination." [402 US 1 at 22; 28 Law Ed 2nd at 570; 91SCt 1267 at 1279]

Finally, the Court came as close as it ever has done to defining a unitary school system when it said:

"Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools." [402 US 1 at 23; 28 Law Ed 2nd at 570; 91SCt 1267 at 1279]

We may conclude that a unitary school system is one in which the school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race. At the same time, the Court recognizes that a unitary school system might include disproportionate racial concentrations in some schools, so long as those disproportionate concentrations are not caused by action on the part of school authorities with intent to segregate. State discriminatory actions are proscribed; other factors which result in racial imbalance in the schools are beyond the scope of the Court's activity. In fact, the Court said specifically:

"The Constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." [402 U.S. 1 at 24; 28 Law Ed 2nd 554 at 24; 91SCt 1267 at 1280]

In fact, the Court tells us that "absent a Constitutional violation, there would be no basis for judicially ordering assignment of students on a racial basis."

To summarize these important distinctions, we may say that the Supreme Court holds it unconstitutional to assign pupils on the basis of race; however, when a court finds a situation where pupils have been assigned on the basis of race, then equity requires that this "Constitutional violation" be compensated by pupil assignment on a racial basis. Yet this compensatory action is obviously of limited duration. Compensation cannot go on forever; nor can a sound theory of the Constitution endure a permanent suspension of the Constitutional right not to be assigned on a racial basis.

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The Court itself calls this suspension an "interim period." Referring to remedial altering of school zones in *Swann*, it said:

"As an interim corrective measure, this cannot be said to be beyond the broad remedial powers of a Court." [402 U.S. 1 at page 27; 28 Law Ed 2nd 554 at page 573; 91SCt 1267 at 1282]

Noting the burdens which court orders impose—burdens the Court itself admits may be "administratively awkward, inconvenient and even bizarre"—the Court says, "but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems. [402 U.S. 1 page 28; Law Ed 2nd 554 at page 575; 91SCt 1267 at 1282]

It follows therefore that Congress is at liberty to impose a legislative definition of a normal interim period. Moreover, the situation which the courts are seeking to remedy is in constant flux. School authorities, pupils, and families come and go. The inherent logic of the Supreme Court's argument demands that the extraordinary suspension of Constitutional rights come to an end within a reasonable length of time. The Court itself accepted its own logic. In the remarkable concluding paragraphs of *Swann*, the Court had this to say:

"At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems will then be "unitary" in the sense required by our decisions in *Green* and *Alexander*. It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that Federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." [402 US 1 at 31; 28 Law Ed 2nd 554 at 575; 91SCt 1267 at 1283]

Working strictly within the constraints of the Court's reasoning, we can see therefore that there can and must be an end to pupil assignments on the basis of race. There can and must be an end to busing, pairing, zoning, and so forth. A return to neighborhood schools is not only desirable, but feasible under current court decisions. The only question is when.

IV. THE DURATION OF COURT JURISDICTION

Thus neither school authorities nor district courts are required to adjust the racial composition of student bodies "once the affirmative duty to desegregate has been accomplished and racial discrimination through official action has been eliminated from the system." The suspension of the Constitutional right of pupils not to be assigned to a school on the basis of race is of limited, but indefinite duration. Since the Supreme Court itself has admitted that the suspension of rights is of limited duration, it is entirely proper for the Congress of the United States to pass legislation setting a definite time limit during which the courts can suspend these rights.

I believe that a great majority of school systems have by this time become desegregated under the terms of the original orders of the Federal courts, by compliance with the guidelines issued by the Commissioner of Education, or remain in a form historically instituted without reference to racial separation either by law or collusive drawing of attendance zones. Current problems before the courts accordingly are, in possibly a majority of cases, directed against resegregation caused by population shifts occurring subsequent to prior school desegregation. Quite frequently it is argued that the actions of school authorities, although possibly taken today without regard to race, are tainted by the vestiges of past actions. In the forefront of such actions are those which attempt to overcome the increasing concentration of blacks in inner city areas by overriding political boundaries existing between different school systems as in the cases of Richmond and Detroit where massive busing into suburbs has been directed.

Yet in every case, the orders are different, the standards are different, and the burdens to be borne and the levels of compliance are different. The length of time the school systems remain under court jurisdiction is entirely at the discretion of the court. Every court commands the establishment of a "unitary system," but the level of compliance varies. There are two difficulties. First, "unitary" is indefinite both in quantum and period of time. Second, the equitable doctrine of continuing jurisdiction over an existing decree permits the courts to change pre-existing orders from time to time in order to correct situations which have changed after an initial determination and local compliance.

It is within the power of Congress to statutorily define the unitary concept, to fix its effective period and to terminate continuing District Court jurisdiction, provided only that in so doing the Congress does not specifically or by implication permit the restoration of a school system based on racial separation.

V. THE REMEDY

The Public School Jurisdiction Act provides the required remedy. It defines a "unitary school system" within the constraints of current practices.

(1) First of all, it accepts the work of any Federal court that has approved a desegregation plan to achieve a unitary system. If the court has said that such and such a plan will bring a system into compliance, then the Public School Jurisdiction Act agrees that it is a plan which will bring about compliance. In the same way, the Public School Jurisdiction Act also accepts compliance with any specific plan or generally published guideline authorized or approved by the Commissioner of Education. Both accomplish the same end and should have equal standing in the light of the numerous court references to such guidelines as indicative of the meaning of the term "desegregated school."

Thus this first definition does not negate any plan currently in effect. It makes every court order and every HEW pupil assignment plan part of the definition of "unitary school system." There are some activists who say that present plans do not go far enough. Yet, present plans must go at least as far as the Supreme Court itself has gone. Those who want to go further are not arguing law, but questions of policy.

(2) The Public School Jurisdiction Act's second definition of a unitary school system accepts the decision of any court of the United States upholding a pupil assignment plan as in compliance with the laws and Constitution of the United States. Thus any school system which has successfully defended itself against the charge of unconstitutional actions is, on the face of it, a unitary school system. This is really a corollary of the first definition. A court decides whether a school system is unitary or not.

(3) The Public School Jurisdiction Act's third definition of a unitary school system also involves a court test. Here, if a court decided that attendance zones were originally established with reasonable geographical divisions without the intent to discriminate—and no changes had been made except for reasonable educational discretion—then such a school system is a unitary school system. Such a finding is a reasonable defense against demands that school attendance zones be altered within a system, or that the system be merged with adjacent systems in other political jurisdictions.

(4) The Public School Jurisdiction Act's fourth definition recognizes that many courts under a plea of equity have tried to fashion some formula for the over-all racial composition of student bodies as evidence of the school authorities' affirmative action. Up to now, this has been left to the decision of the individual judge, with no guidelines for him to follow. The courts have acted variously with respect to their racial ratio requirements, which, despite Federal assistance legislation to the contrary, is being used by the Federal courts and to some extent as well by the Department of Health, Education and Welfare as a target for the requirements of busing and the other techniques. Most courts have differed in the extent to which they view an approximation of local racial ratios as being required and the extent to which it will be applied across the board to all public schools in the system or be compromised to lessen the amount of change required.

In fact, in *Swann*, the Supreme Court was at pains to point out that it approved the District Court's order only because that order was not to be interpreted as a "fixed mathematical racial balance." The Court said:

"If we were to read the holding of the District Court to require, as a matter of substantive Constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The Constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." [402 US 1 at 24; 28 Law Ed 2nd 554 at 571; 91SCt 1267 at 1280]

Indeed, the Supreme Court quoted approvingly from the District Court's own explanation as follows:

"This court [the District Court] has not ruled and does not rule that 'racial balance' is required under the Constitution; nor that all black schools in all cities are unlawful; nor that all school boards must bus children or violate the Constitution; *nor that the particular order entered in this case would be correct in other circumstances not before this court.*" (Emphasis in original) [402 US 1 at 24 (n. 9); 28 Law Ed 2nd 554 at 571 (n. 9); 91SCt 1267 at 1280 (n. 9)]

Although the Supreme Court thus holds that there does not have to be a rigid mathematical formula, there are still no guidelines for a lower court to follow in fashioning a remedy in equity. The Public School Jurisdiction Act has a formula under which Congress sets up the parameters. It provides for the kind of flexibility which the Supreme Court demanded in *Swann*, keeping in mind that the Court only approved a "very limited use made of mathematical ratios . . . within the equitable remedial discretion of the District Court." These limitations must be borne in mind. [402 US 1 at 25; 28 Law Ed 2nd 554 at 572; 91SCt 1267 at 1280]

Basically, the formula would provide that a control group of not less than two-thirds of the schools of a local educational agency would have to meet certain standards of racial composition in enrollment if the school system does not otherwise qualify as a unitary school system. These standards would be based upon the ratio of whites and blacks in the school system: an individual school in the control group would have to have at least one-third of the percentage of majority students in the school population as a whole, and one-third of the percentage of minority students in the school population taken as a whole.

All in all these are not definitions which I endorse for their substance; I endorse them because they will work within the system as it is now constituted. They provide fair definitions of a unitary school system so that judges will have an objective standard of justice, nor do they upset current legislation or court orders on the subject.

(5) The other aspect of definition is to put a limitation on the duration of the suspension of the Constitutional right of students not to be assigned to schools on the basis of race. As I have already pointed out, it is unhealthy for Contitutional rights to be suspended indefinitely. Congress can put a reasonable limitation on the length of time required to demonstrate that a dual school system has been abandoned. It would be highly suspect if Congress were to put severe limitations on the so-called remedies available to courts in equity. It might be charged that due process of law or equal protection was being abridged by statute. But a reasonable time limitation violates neither. The courts would still have all the powers that they now have to order desegregation plans, to order busing, pairing, and so forth. The power to order the organizational disruption that we now have in our school systems would not be abated. The only difference would be that it could not go on forever.

The Public School Jurisdiction Act sets a limitation of one full school year. This would apply either to schools on a nine-month plan or on a twelve-month plan. It assumes that the school authorities are acting in good faith and that they actually do what they are ordered to do. One year is a significant administrative unit in a school system, as pupils normally move from one grade to another in that year's time. The courts will see to it that the assignment plan is comprehensive enough to compensate for past unconstitutional practices; the year's duration under the court's jurisdiction will see to it that a Constitutional assignment plan is actually in operation.

It must be remembered that the Supreme Court has said that the Constitution itself does not command proportional racial composition of student bodies; once a violation has been corrected, the Constitution is indifferent to assignment methods, so long as school authorities do not make assignments on the basis of race. School authorities are not required to make pupil assignment adjustments for discrimination that may result from other factors in society, once the affirmative duty to discriminate has been accomplished. This means that the neighborhood school—favored by the overwhelming majority of Americans of both races—can return once the violations have been corrected.

During the space of a school year, the dislocations of student bodies and teachers would have to be endured. There is no way within the present grammar of the court decisions that this can be evaded where the schools have been found to be operating dual systems. But it would be endurable because the end would be in sight.

Moreover, many school systems have already met and have been meeting the definition of a unitary school system for one, two, three, or four years. Under the Public School Jurisdiction Act, they could pass the test immediately. What counts as far as meeting the Constitutional test is the actual time served under court orders without regard to the passage of the Public School Jurisdiction Act. A statute cannot affect the Constitutionality of an action.

At the end of a full school year, the school authorities, State officials, or any parent can apply to have the case reopened so that the judge involved can submit the case to a jury to make a determination that the school system has met the statutory definition of a unitary school system for a full school year. The determination is narrowly limited to questions of fact, i.e., whether the plan decreed by the court has in fact been followed. The judge would have no opportunity to reassess the case itself or to consider new data.

Upon reopening of the case, enforcement of the judge's court order is stayed until the final determination has been made. This would ensure prompt actions by the Court so that any affected parties could make a timely appeal if desired.

(6) Once the determination was made that the school authorities had been operating a unitary school system for the required length of time, then the system would be released from Federal District or Appeals Court jurisdiction in matters relating to segregation and allied problems. The matters could not be raised again in the Federal courts.

Nevertheless, the full system of State courts remains open to plaintiffs who allege that their Constitutional rights have been abridged by some action of the school authorities, including appeal to the U.S. Supreme Court.

Thus it is clear that due process and equal protection are carefully preserved by the Public School Jurisdiction Act. Every school system may be brought into Federal court at least once, and that court will have the opportunity to apply the full range of so-called "remedies" that it perceives to be necessary. The "unitary school system" which the U.S. Supreme Court says is Constitutionally required will have been established and it will have actually been put into operation. If further State-directed discrimination occurs, the full range of State courts is available for redress. The United States Constitution would assure this, but for the sake of clarity, the Public School Jurisdiction Act spells it out.

(7) Finally, the Public School Jurisdiction Act provides a specific exemption to preserve the right of any student who feels he has secured particular advantages under any current assignment plan. I think we can be sure that most parents will wish their children to attend school under a neighborhood school plan if one is offered. There may be some who are being transported to schools outside their neighborhood where they feel they have special advantages. If there are such, they can be allowed to continue to be transported to those schools if they so choose. They have this right not by Constitutional protection, but in the interests of good educational policy and sound community relations. Thus, under the Public School Jurisdiction Act, no child would lose what he or his parent perceives to be an advantage from the current system.

(8) The Public School Jurisdiction Act preserves the interests of all those concerned. It maintains current court holdings, decrees, and HEW plans. It preserves all Constitutional rights under the present mode of interpretation. It provides for the orderly termination of Federal court jurisdiction so that standards are uniform throughout the Nation. It provides for the early restoration of local control over attendance plans. And it safeguards the interests of those who feel they have obtained advantages under the present situation.

But most of all, it will bring about the re-building of a wholesome educational atmosphere and constructive community relations. The best society is the society that has the maximum of free choice and evolves from the myriad decisions of each citizen over the years, and over the generations. To destroy that organic development is to destroy the very fabric of a healthy society. The destruction has been imposed upon us by the courts, and it is time for Congress to being re-building.

Senator HELMS. Thank you very much, sir.

Senator ERVIN. The equal protection clause provides that no State shall deprive any person within its jurisdiction of equal protection of the laws.

Is it not obvious that this clause was put in the Constitution so that it would be for the protection of the American people?

Senator HELMS. Yes, sir.

Senator ERVIN. Let me ask you this.

When the Supreme Court holds that the equal protection clause requires or permits little children to be denied the right to attend their neighborhood schools and requires or permits them to be bused to schools elsewhere, does not the Court in effect convert a constitutional principle which was designed to prevent tyranny by the States and permit tyranny to be inflicted by the Federal Government?

Senator **HELMS**. Mr. Chairman, as is customary, you are eminently correct.

Senator **ERVIN**. Thank you very much.

Senator Cook?

Senator **COOK**. No questions.

Senator **ERVIN**. Thank you.

Senator **HELMS**. Thank you very much, Mr. Chairman.

Senator **ERVIN**. The next witness is Mrs. Jean Ruffra, who speaks on behalf of herself and the organization known as Save Our Community Schools, Inc., in Louisville, Ky.

Mrs. Ruffra, I would like to welcome you to the committee. The committee has received at least 2,500 telegrams from Kentucky in support of your position and in support of some of these bills.

I am not going to put all of these in the record, but I am going to read only some that were picked out of the sample. One of them is from Mr. and Mrs. Louis E. Douglas. "We fully support S. 1737 that will restrict the Court from busing our grandchildren." One from Mr. and Mrs. Edmond Goldberg: "Busing is bad for everyone." One from L. H. Horton: "I fully support Senate bill 1737 which would restrict the Courts from busing our children."

This is one from Mr. Ronald Douglas which says—

> You have our full support in passing legislation to prohibit forced busing of school children for any reason. Jefferson County, Kentucky is under court orders as of September. Your broad action to correct an unlawful interpretation of the law will endear you to millions of parents who will not surrender their prerogative to the state.

You may proceed.

TESTIMONY OF JEAN RUFFRA, SAVE OUR COMMUNITY SCHOOLS, INC., LOUISVILLE, KY.

Mrs. **RUFFRA**. Mr. Chairman and Senator Cook, thank you for this opportunity to testify before this committee on behalf of Save Our Community Schools, Inc., representing the citizens of Kentucky.

After hearing the testimony of Congressmen, attorneys, and school board members during these hearings, I feel very humble, but also pleased, to present our views on the busing issues.

Our organization consists of merely parents such as I, who are deeply concerned about our children and our country.

Jefferson County, Ky., is made up of three public school districts. Suits were filed against our school board for merger and desegregation of these three systems. If this is carried out, this system, the metro system, will contain approximately 140,000 students. The district Federal judge ruled that the schools were integrated and no State-imposed segregation exists within the three systems. The sixth circuit court overruled this decision, and an order for total integration and said boundary lines will impose no barriers.

The three school boards are appealing this decision to the Supreme Court. Based on what has happened in other areas, we will very likely have massive busing by this fall.

As a mother of three daughters, I am deeply concerned about the education of my children. Not only am I concerned about by own children, but all children, and as the Senator said, the people in Jefferson County, Ky., are very concerned, by the response of the telegrams. The citizens of Kentucky feel the forced busing issue throughout our country is most serious. As parents, one of the most important concerns of our life is our children. We believe it is our duty to care for our children to the best of our ability, whereas it is the duty of our public school system to provide the best education possible and we also feel it is the duty of our elected officials to protect the constitutional rights of our children.

The majority of people are not opposed to integration, but are opposed to the method being forced upon us to achieve integration. The people in Kentucky feel the real issue is quality education for all children. This is not a racial issue and we certainly would hope not a political issue. It is true, some districts are rich in children, but poor with poverty, but because some of our children must suffer from poverty, should we insist the rest suffer along with them?

Every child should be given the opportunity to obtain a quality education regardless of race, color, religion, or national origin. Too much emphasis is placed on where a child attends school. We believe this emphasis should be on the quality of education, not on school location or the ratio of black or white children. The money being spent on forced busing could and should be spent to improve the substandard schools. A quality education is determined by the quality of teachers, administrators, and curriculum.

Forced busing has proven to be more discriminatory to the underprivileged child for whom it was originally intended to benefit. The children being transported many miles from home are deprived from participating in school activities. In many instances, extracurricular school activities are the only available recreation for a child on the poverty level. Forced busing has only changed the children's environment during school hours. When school hours are over, these same children are forced back into an environment more dismal than the one from which they came, because they cannot afford transportation to school sponsored functions. Their neighborhood schools are no longer the center of community activities.

Forced busing has created an economic segregation. In areas where it has been instituted, parents who could afford to, have enrolled their children in private schools to avoid crosstown busing, thereby segregating the underprivileged from the more affluent. The education of every American child, whether he be black or white, is a very personal matter to his parents. We believe the freedom of choice concerning the education of our children should not be available only to the affluent. We believe that parental involvement in the public school system is very important to the school system, the community, the child, and the parent. Our better schools today are the schools in which the parents are actively involved. In areas where forced busing exists, parental involvement is practically nonexistent. This we believe has been the cause of a marked increase in emotional disturbances in children. They no longer have the security resulting from a close knit home, church, community, and school involvement.

Forced busing is not in the best interest of children. The sole purpose of our educational system is to train our youth for the challenges of tomorrow. The use of educational funds for forced busing decreases the funds for educational purposes, thereby downgrading the quality of education rather than enhancing it.

As God in His wisdom has only given us 24 hours in a day to utilize, whereby we find 8 hours for the service of God and a distressed worthy human being, 8 hours for our usual vocation, and 8 hours for refreshment and sleep; forcing any child to spend any part of that 24 hours wastefully and needlessly is an injustice in that that time can never be regained.

We believe that forced busing is depriving 90 percent of the American people of their civil rights and is unconstitutional. In 1954, the Supreme Court ruled in the *Brown* v. *Board of Education*, that separate but equal facilities were unconstitutional. The Court held it was a violation of the 14th amendment for a State to require segregated schools. Our country accepts the legal doctrine that forcible segregation deprives our citizens of equal protection of the laws, but nothing in the *Brown* case requires forcible integration, that is, the mixing of whites and blacks or other races in the public schools to achieve a so-called racial balance. There are no Federal or State laws saying that the public schools must have a racial balance or which require the busing of pupils to achieve a racial balance.

In fact, the Federal Civil Rights Act of 1964 clearly outlaws assigning children to any public school on the basis of color. To assign a child to a school solely by virtue of his race in this most important aspect of his young life is to execute racism, State imposed racism, not essentially different from the pre-*Brown* decision. We believe forced busing is an insult to children; there is the underlying assumption that black children will be upgraded and motivated if they sit beside white children and that society will be improved thereby.

There is nothing in the history of man or government to support this theory. The whole concept is presumptuous and self-defeating. The stated presumption of the busing issue is to achieve equality. We are all created equal, and there it ends. All children are not equal in ability, financial status, or even physical appearance. If such equality is ever achieved, we will have a nation of robots. That all people should remain equal throughout life is not the principle of a democracy. Should we no longer teach our children the meaning of the word "incentive" and teach them to abandon the American dream that by working hard you can improve your status in life? The rights of 90 percent of the American people are being denied when courts order forced busing. Civil rights are those rights belonging to the people, all people. Forced busing is not equal protection of the law, it is equal discrimination under the law.

We live in a violent prone, permissive type of society in which the rights of the individual are zealously protected. Individual rights are a trademark of today's citizens and the forced implementation of any idea, by its very nature causes polarization. In essence, the courts have said you have the right to decide for yourself whom you worship or whether you worship at all, the right to vote or not to vote, the right to agree or disagree and even the right to wear your hair the length of your choice and we guard each of these rights jealously. Yet, with all these rights, suddenly the basic right to send your children to their neighborhood schools is denied simply because past injustices were done.

In the past, children in the public school systems have been segregated on the basis of color. This was wrong then, but it is just as wrong today to place children in a public school solely on the basis of their color, whether the purpose be to segregate or to integrate the system. What our country needs today is a better understanding between the peoples of our country. Unfortunately, a better understanding cannot be legislated. We will be the first to agree prejudices do exist in both the black and white races, but we do not believe this to be the basis on which people are objecting to the forced busing of students to obtain a racial balance. The reasons for objecting to this are many and varied, but the principal reason being that it is depriving parents of the right to determine what is best for their children. Parents object to their children being used for social experimentation and this is an experiment which has not proved successful in other areas.

Those who advocate busing may be motivated by the best of intentions to achieve quality education, social unity, or whatnot. There is no occasion to doubt that they sincerely and genuinely believe that what they seek is good. But there always have been and probably always will be, those who have a great urge to plan and prescribe what they deem to be best for everybody. In that process they are often quite willing, consciously or unconsciously, to override any individual liberties that stand in the way of what they consider beneficial and desirable.

Daniel Webster said: "It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions." Forced busing violates the basic concept of our American democracy as stated in the Bill of Rights because, "The people rule, and they can rule wisely only if they have an opportunity to make up their own minds."

We hope that Congress will heed the will of the people and immediately pass legislation to stop this discriminatory forced busing of children. Thank you again for this opportunity to appear before this committee and convey to you the feelings of the majority of Kentuckians.

Senator Ervin. I wish to commend you on the excellence of your statement.

Do you not believe that the overwhelming majority of American parents—of all races—are opposed to forced busing?

Mrs. Ruffra. Yes, sir, I do.

Senator Ervin. In San Francisco where a substantial part of the population is of Chinese ancestry the court wanted to force busing and the Chinese parents said that they wanted to preserve for the benefit of their children, their own culture. Do you not believe that is true of most American parents regardless of which particular group they are a part?

Mrs. Ruffra. Yes, sir.

Senator ERVIN. Do you not believe that the strength and the greatness of America arises out of diversity of people rather than out of making them think the same thoughts and agree on the same propositions?

Mrs. RUFFRA. Yes, sir.

Senator ERVIN. The Supreme Court of the United States declared, in one case, that parents have a particular right with respect to the question of whether their children should go to school. That was a case involving the issue of whether a State can pass a law requiring children to go to public schools as counterdistinguished from church schools.

Do you not believe that the American parents love their children more than any other human beings on this earth, and for that reason, are more interested in their education than those whose main desire it is to make guinea pigs out of them?

Mrs. RUFFRA. Yes, sir, I do.

Senator ERVIN. Thank you very much for a most illuminating statement.

Senator COOK. Mr. Chairman, I wish to thank you for having invited me here and I would like to ask the indulgence of the subcommittee since I am not a member, that Mrs. Riley, who is president of the State Parent-Teachers Association, could insert a statement.

Senator ERVIN. The committee will be delighted. The committee is delighted to have you here at this time.

[The material referred to follows:]

FOURTEENTH DISTRICT,
KENTUCKY CONGRESS OF PARENTS AND TEACHERS.
February 22, 1974.

Senator MARLOW W. COOK,
Old Senate Office Building,
Washington, D.C.

DEAR SENATOR COOK: Please insert the following information into the hearing record for Senate Bill 1737:

At the regular meeting of the Fourteenth District PTA, on February 6, 1974, the following resolution was adopted by the delegates:

"Whereas, the Fourteenth District PTA does not oppose integration, but does oppose busing of children across the county to achieve this integration, therefore, be it

"Resolved, that the Fourteenth District PTA supports the Jefferson County Board of Education in its appeal to the Supreme Court to hold the District Court ruling that school district boundaries are sacred."

The Fourteenth District PTA is composed of the 95 PTA units in the Jefferson County System. We currently have over 50,000 members. It may be of further interest to you that at the 1972 National Convention, the following resolution was adopted:

"Whereas, the PTA recognizes that the learning process is a continuing one, and

"Whereas, the community school may be the vehicle for realizing the full potential of every individual, regardless of age, and

"Whereas, the philosophic principle that the public schools belong to the people of the community may become a reality under this program, and

"Whereas, the community school integrates insofar as possible the community's educational, social, physical, recreational and health programs for children, youth and adults, be it therefore

"Resolved, that the National PTA and all its branches promote the development of the community school program to more fully utilize the public school facilities."

I surely appreciate your efforts in regard to this matter.

Sincerely yours,

MRS. PAT DOLACK, *President.*

FIFTH DISTRICT OF PARENTS AND TEACHERS,
Louisville, Ky., February 22, 1974.

Hon. MARLOW COOK,
Senator, Old Senate Office Building,
Washington, D.C.

DEAR SENATOR COOK: The following position was taken by representatives of the Fifth District PTA (Lou. City School Units) at their meeting February 14, 1974.

"The Fifth District PTA is opposed to involuntary busing of students".

We thank you for your concern and appreciate your help.

Sincerely,

MRS. ORVILLE CASEY, *President.*

Mrs. RUFFRA. Thank you very much.

Senator ERVIN. The next witness is Stephen Horn, who represents the U.S. Commission on Civil Rights.

TESTIMONY OF DR. STEPHEN HORN, VICE CHAIRMAN, U.S. COMMISSION ON CIVIL RIGHTS; ACCOMPANIED BY LARRY GLICK, ACTING GENERAL COUNSEL, U.S. COMMISSION ON CIVIL RIGHTS; JOHN BUGGS, STAFF DIRECTOR, U.S. COMMISSION ON CIVIL RIGHTS; AND CAROLINE F. DAVIS, DIRECTOR, EDUCATION DIVISION, U.S. CIVIL RIGHTS COMMISSION

Mr. HORN. Thank you, Mr. Chairman.

Mr. Chairman, I have a rather lengthy statement which, if we could insert it in the record, I would be delighted to summarize for you for your convenience.

Senator ERVIN. That will be all right. The statement will be printed in full in the body of the record.

[The prepared statement of Stephen Horn follows:]

PREPARED STATEMENT OF HON. STEPHEN HORN, VICE CHAIRMAN OF THE U.S. COMMISSION ON CIVIL RIGHTS, ON S. 1737, THE STUDENT FREEDOM OF CHOICE ACT

Mr. Chairman and members of the subcommittee, I am Stephen Horn, Vice Chairman of the United States Commission on Civil Rights. I wish to thank you for the opportunity to testify on S. 1737, the "Student Freedom of Choice Act" and related legislation which would constrain the constitutionally mandated desegregation of our Nation's schools. With me today are the Commission's Staff Director, John A. Buggs, our Acting General Counsel, Lawrence B. Glick and Caroline F. Davis, Director of the Commission's Education Division.

S. 1737 is one of a number of proposals which attempt, through Congressional action to prevent or to limit further efforts to desegregate the Nation's public schools. In fact, S. 1737 is one of 50 separate House and Senate bills, Joint and Concurrent Resolutions, currently before the 93rd Congress, which addresses the question of busing for purposes of desegregation.

The Commission on Civil Rights has consistently opposed such legislation and our publications on this subject have been straight-forward and exact in setting forth our views in this area. In addition to responding to individual requests from Members of the Congress, the Commission has testified or submitted a statement no less than four times during the 92nd Congress and the 93rd Congress on the so-called "busing issue." In his testimony of July 28, 1972 on "The Equal Educational Opportunities Act of 1972" the Reverend Theodore M. Hesburgh, President of the Notre Dame University and long time Member and Chairman of the Commission, raised a series of critical questions on the whole issue of anti-busing legislation. Father Hesburgh said, and I quote:

"If this measure is designed to implement the 1954 decision of the Supreme Court requiring desegregation of racially segregated schools, it fails. If it is designed to provide equal educational opportunities to the minority group children of the Nation it fails. If it was designed to move the Nation toward one society with Justice for all, it fails.

"If it was designed to further fractionalize the Nation along racial lines, it succeeds. If it was designed to deprive minorities of the equal protection of the laws, it succeeds."

Those words seem applicable to the legislation before this Subcommittee—not so much because this legislation bears the same title or uses similar language, but because they are similar in purpose and will have an identical effect.

It is our view that Congressional action limiting school desegregation would have a negative effect on race relations in the Nation, would unsettle and thwart the progressive development of Constitutional law in this area, and would condemn future generations to less than the best education America has to offer.

Despite protestations to the contrary, legislation of this type will not bring us together as a people. In fact, it will divide us. S. 1737 and its relatives in the legislative hopper cannot provide equality of educational opportunity in this land. For no matter how much choice is permitted in selecting the location of the place of one's education, it avails nothing if our children—black, brown, yellow, red, and white—are educated in isolation from each other and their ability to choose is limited by considerations of race and finance.

The results of racial, ethnic, and social class isolation have been documented. The New York State Commissioner of Education testified before a Congressional subcommittee in connection with hearings on House Joint Resolution 20, a Constitutional amendment to ban busing for school desegregation purposes. He stated then:

"1. Results of current research clearly indicate that schools isolated on the basis of race may be decidedly harmful to the academic achievement of their students. It must be said too, that racial isolation is a part of the broader problem of social class isolation.

"2. The studies of more than 50 school integration programs generally substantiate the positive effects of integration reported in the more representative national or regional studies of the issue.

"3. When lower-status students are transferred to schools with predominantly upper-status students, the evidence suggests that continued residence in a lower-status neighborhood will not interfere with the achievement gain that is to be expected as a result of attendance in the school with predominantly upper-status students.

"4. In integrated schools the aspirations and the self-esteem of black students are positively affected.

"5. The findings of national and local studies generally indicate that the integrated school setting improves interracial understanding among Negro and white students.

"6. Transfer of the minority child to schools with predominantly majority children is more likely to help his/her (sic) education if certain specific conditions are met." [1]

The legislation now before this Subcommitte will amount to a declaration that national policy will henceforth tolerate the continuance of racial segregation in our schools. We have had enough bitter experience in recent years with the consequences of racial animosities to persuade us, that as a Nation, we should avoid such a declaration.

Many of the advocates of this legislation, no doubt, honestly believe that it will not perpetuate a policy of racial segregation in our schools. But S. 1737 and similar legislation can have no effect other than to bring an end to the continuing process of school desegregation. This would be accomplished by redefining what constitutes a denial of equal protection of the laws in education, by limiting the authority of Federal agencies to encourage desegregation or deter segregation, and by hamstringing the ability of the courts to provide relief.

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[1] Testimony of Mr. Ewald B. Nyquist. *School Busing*, Hearings Before Subcommittee No. 5 of the Committee on the Judiciary, U.S. House of Representatives, 92nd Congress, Part 2, March 16, 1972, pp. 1026–27. In addition, the Commission has documented on several occasions the causes and educational effects of racial isolation in the public school system. Most notable is the Commission's 1967 report, *Racial Isolation in the Public Schools*, which was prepared at the request of President Lyndon B. Johnson who asked the Commission to "gather the facts."

ANALYSIS OF CERTAIN PROVISIONS IN S. 1737

The Commission on Civil Rights wishes to express its general opposition to S. 179, S. 287, S. 619 and S. 1737.[2] This Section of my testimony, however, will be specifically directed toward those provisions of S. 1737 with which the Commission is most concerned.

Sections 1202–1205 of S. 1737 if adopted, would, in essence repeal Title VI of the Civil Rights Act of 1964 (as amended)—as it applies to education. The Commission has long believed that Title VI, despite inadequate and ineffective enforcement, represents an essential part of this country's effort to eliminate the last vestiges of previously segregated, dual school systems. S. 1737 would seriously limit the Federal effort to desegregate public education by eliminating the instrument which has been the mainstay of the attack by the Executive branch on segregated education.

By eliminating the instrument, S. 1737 in essence repeals Title VI of the Civil Rights Act of 1964 as it applies to education and thus deprives this Nation of one of its most effective tools for ensuring equal educational opportunity. Utilizing its authority under Title VI, the Department of Health, Education, and Welfare (HEW) between 1966 and 1970 was able to take decisive steps to dismantle dual school systems in the South. During those years, two hundred and two (202) districts in the southern and border states faced Federal fund termination as a result of a determination of noncompliance with Title VI. All of them subsequently negotiated desegregation plans with HEW.

According to the most recent DHEW figures[3] administrative enforcement coupled with court action between 1968 and 1972 resulted in a decrease from 81.6 percent to 55.6 percent in the number of black students in the South attending 50–100 percent minority schools.

While these figures seem encouraging, the battle to end segregated education has not been won. In addition to the continuing isolation of more than 1,759,867 black students in southern States, severe racial isolation exists in the North and West—where in 1971 70.9 percent or 2,007,235 black students were attending 50–100 percent minority schools. It is apparent from *Keyes* v. *School District No. 1*, 413 U.S. 921 (1973) and other court cases that northern and western segregation is as deliberately imposed as segregation brought about in the South by State law. Federal officials are just beginning to identify the means by which such segregation occurs, including, for example, the gerrymandering of school district boundaries and the construction of schools to perpetuate patterns of segregation. S. 1737 would leave the Federal Government with fewer effective mechanisms for ending such discriminatory practices and would seriously cripple the effort to desegregate schools nationwide.

Despite the need for vigorous Federal action to end segregation once and for all, the Department of Health, Education, and Welfare has been unwilling to utilize the full force of Title VI for desegregation. Following "The President's Message to the Congress on Educational Opportunity and Busing" on March 17, 1972.[4] HEW's program to eliminate discrimination in public education came to a virtual standstill. This development was manifested in two ways: (1) almost no reviews conducted after 1971 covered discrimination in student assignment, and (2) in some cases, where racially or ethnically isolated schools were identified in reviews, school districts were not required to desegregate such schools.

Passage of Title VIII of the Education Amendments of 1972, expressly prohibiting use of Federal funds for transportation or "busing" of students or teachers for desegregation purposes, has contributed further to HEW's reluctance to require transfers of students for desegregation and to review a school district for problems of racial segregation.

Department of Health, Education, and Welfare's reluctance to utilize Title VI in rooting out discrimination resulted in *Adams* v. *Richardson* 480 F. 2d 1159

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[2] S. 179 (by Senator Griffin) will limit the jurisdiction of Federal courts to issue busing orders based on race. S. 287 (by Mr. Scott of Virginia) removes from the jurisdiction of all Article III courts (whether created by the Constitution or Act of Congress) any case or controversy involving the public schools. S. 619 (by Senator Allen) establishes uniform criteria for formulating judicial remedies for the elimination of dual school systems.

[3] See the results of the third national survey on the extent of desegregation by DHEW. The survey was based on Fall 1972 data from about 85 percent of the survey districts. April 12, 1973 (HEW Press Release).

[4] The President submitted to the 92nd Congress H.R. 13915, "The Equal Educational Opportunities Act of 1972," and H.R. 13916, "The Student Transportation Moratorium Act of 1972." The Commission voiced its opposition to both proposals in a statement in March 1972 and before the Congress on three separate occasions.

(D.C. Cir. 1973) No. 73-1273. Plaintiffs were able to argue successfully that the Department had failed to carry out its responsibility under Title VI of the Civil Rights Act of 1964 by allowing school districts found in noncompliance in 1971—many for maintaining racially disproportionate schools—to continue receiving Federal financial assistance, HEW is currently under court order to bring into compliance the 197 school districts affected by the *Adams* decision.

Although HEW has not vigorously enforced Title VI for desegregation purposes, the Department has creatively utilized its Title VI authority to investigate "in-school discrimination" or discrimination which occurs in purportedly desegregated schools. S. 1737 also would end these efforts, which have already resulted in improving the quality of educational opportunity for countless minority and white students. Rather than to have the investigation and remedial action of "in-school discrimination" stifled by passage of S. 1737, HEW should be required to marshal as much determination and thoroughness to end segregation of students as has been expended in connection with "in-school discrimination." Title VI must be fully utilized to eliminate both segregation of students and in-school discrimination if we are to end the discrepancies in educational opportunity which now exist.

The reliance in S. 1737 on desegregation by freedom of choice, can only be viewed as a deliberate effort to condemn minority children to segregated education and as a step backward toward a racially separate society. The failure of freedom of choice plans in bringing about desegregation is well established,[5] and both the courts and HEW have abandoned, for the most part, such plans as a viable means for achieving desegregation.

In a 1969 report entitled 'Federal Enforcement of School Desegregation," this Commission found that in a sampling of Louisiana school districts, freedom of choice plans had failed to bring about meaningful change in the racial composition of schools in the sample districts. In that report, the Commission concluded that freedom of choice plans removed from school boards the responsibility for desegregation, and placed an unfair burden on minority parents for the selection of schools for their children. Numerous instances were cited where the selection of white schools by black parents subjected the parents and their children to violence, intimidation, economic coercion, and harassment by white students, teachers, or school officials.

Because of the lack of success of freedom of choice plans, HEW and the courts have acted to limit the use of such plans. In 1966, HEW issued guidelines setting forth standards for determining if a freedom of choice plan was operating satisfactorily. Guidelines issued two years later refused to rely on freedom of choice and specifically delineated requirements for desegregating students and faculty. In 1968, the Supreme Court supported HEW's position in *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), by finding that a freedom of choice plan was not acceptable *per se* unless it resulted in the abolition of the dual school system.

S. 1737—An Unconstitutional Abridgment of Certain Rights Protected by the Fourteenth Amendment

S. 1737 raises serious constitutional questions by requiring that the Federal government adopt a hands off policy with respect to State violations of the Constitution. The Supreme Court has made it clear in *Brown II* and *Green* that dual school systems are violative of the Equal Protection Clause and that dual school systems must be disestablished—not with all deliberate speed but immediately. That was in 1967. Since freedom of choice plans have been held not to be an acceptable tool for achieving desegregation—unless use of such plans results in the abolition of dual school systems—the reliance of S. 1737 on such plans would overrule fundamental constitutional rights. As Mr. Justice Brennan said for the Court in *Green:*

"In determining whether respondent School Board met that command by adopting its 'freedom-of-choice' plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a 'prompt and reasonable start.' This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for 'the governing constitutional principles no longer bear the imprint of newly enunciated doctrine.' *Wat-*

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[5] *Southern School Desegregation*, 1966–67, A Report of the U.S. Commission on Civil Rights, July 1967, pp. 45–70.

son v. *City of Memphis, supra*, at 529; see *Bradley* v. *School Board, supra; Rogers* v. *Paul*, 382 U.S. 198. Moreover, a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. 'The time for mere "deliberate speed" has run out,' *Griffin* v. *County School Board*, 377 U.S. 218, 234."

By limiting what may be done to remedy denials of equal protection of the laws in education, the proposed legislation would whittle away the scope of protection presently afforded under the Fourteenth Amendment.

S. 1737—An Unconstitutional Restriction on the Jurisdiction of Federal Courts

Section 1207 of the Student Freedom of Choice Act removes from the jurisdiction of Federal courts the authority to fashion desegregation remedies and enter orders accordingly. Under this section Federal courts are stripped of the ability to order changes in the racial composition of schools, and the transfer and transportation of students and faculty. This attempt to restrict the jurisdiction of Federal courts raises serious constitutional questions. The first question, of course, is whether Congress has the Constitutional authority to deny Federal courts the power to decide desegregation cases and issue implementing orders. The Commission is of the opinion that Congress does *not* have such authority.

The Constitution requires desegregation of public education; however, Section 1207's restriction of Federal jurisdiction would render inoperative the Constitutional mandate of *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954). For although the Constitutional right to desegregated education would remain, the enactment of S. 1737 would render it a right without a remedy.

As Representative Frank Thompson (D. N.J.) and Professor of Law Daniel Pollitt of the University of North Carolina School of Law have so graphically stated in their article *Congressional Control of Judicial Remedies: President Nixon's Proposed Moratorium on "Busing" Orders:*

"A right without a remedy is like a bell without a clapper: an empty promise demeaning to the judge, breeding cynicism and disrespect for the process of the law. This attempted dichotomy has no place in our Constitutional heritage * * * [T]he opposite has been the law since (and even before) the landmark decision by Chief Justice John Marshall in *Marbury* v. *Madison*, 50 North Carolina Law Rev. 809 (1972)"

American constitutional law has always recognized the power to issue remedial orders as an essential ingredient of the judicial power of the United States.

The principle that no branch of government may circumvent or violate the Constitution by doing indirectly what it is forbidden to do directly is firmly entrenched in our Constitutional law. In applying this maxim, Constitutional theory and practice require that substance rather than form be the guiding standard. Segregated education is a Constitutional outlaw; therefore, the Congress is constitutionally precluded from doing anything which would foster segregation. The adoption of S. 1737 would constitute a Congressional stamp of legitimacy for freedom of choice plans. It is logical and reasonable to conclude that the enactment of S. 1737 would result in fostering and perpetuating segregated educational institutions. Thus, Congress by enacting this bill would be aiding in the continuation of a Constitutional violation. Clearly, this is impermissible.

Congressional authority to affect the jurisdiction of inferior Federal courts is a settled principle. That principle, however, is not without its caveats. A most important exception is that Congress may not restrict the jurisdiction of the Courts if by so doing constitutionally protected rights will be abridged or rendered unenforceable. As Judge Chase of the Second Circuit wrote in the *Battaglia* case:

"* * * While Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the Courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property * * * (*Battaglia* v. *General Motors Corp.*, 169 F. 2d 254 (2d Cir. 1948)"

Again, I would like to quote from the article by Rep. Thompson and Prof. Pollitt:

"The * * * cases strongly indicate that Congress has no power to withhold or restrict the jurisdiction of the 'inferior' courts when the withholding or restriction of that jurisdiction would deny or deprive persons of property rights guaranteed by the Fifth Amendment. It follows that Congress has no power to withhold or restrict the jurisdiction of the 'inferior' courts when the withholding or restriction would deny school children of the rights already declared to be theirs under the Equal Protection Clause of the Fourteenth Amendment."

By limiting what may be done to remedy denials of equal protection of the laws in education, the proposed legislation would whittle away the scope of protection presently afforded under the Fourteenth Amendment.

Separating Fact From Fiction—A Look at How Desegregation Is Working

The legislation now being considered by this Committee would reverse the Nation's commitment to desegregate our schools. It seems clear that a major reason for the continuing efforts to withdraw that commitment stems from the feeling of many that school desegregation is not really working to benefit anyone, and that it only serves to antagonize and upset communities to the point where more harm than good results for all concerned.

Twenty years after the *Brown* decision, we find ourselves in the midst of sharpened debate over the worth of school desegregation, given the changes and adjustments it often entails. Some who previously considered the melting pot function of the public schools a relatively easy solution to all the problems of race and class have been displaced by a new set of sociologists who insist, with equal ideological extravagance, that the melting pot was a myth and a failure.

Much of the public confusion and misunderstanding about school desegregation results from the fact that its effects are not easily measured, and we Americans, as pragmatic people, demand hard evidence that such an unprecedented effort in indeed justified. But public uncertainty and misapprehension have also been fostered by the manner in which the school desegregation issue has been treated by many public officials—in Washington and in various individual school districts throughout the Nation. The Commission is concerned that the effect of handling the matter of busing as a political hot potato has been to legitimize an emotional rather than legal position, and to create an atmosphere in which reason is doomed.

The Commission believes that the public interest with respect to this issue is best served by an empirical approach, as opposed to political expediency. When testifying before the Judiciary Committee on May 10, 1972, I cited numerous studies which clearly revealed that, far from damaging or "impinging" on the educational process, busing has clearly permitted many school districts to offer all their children demonstrable, positive gains, both academic and attitudinal.

There is every reason today—18 months later—to reaffirm that statement. Additional studies by the Commission and other organizations in the past year and a half suggest that *school desegregation is working and that most of the fears and anxieties about busing have been proven groundless.*

In a study of school desegregation in ten communities throughout the Nation, released in June 1973, the Commission found that desegregation had proceeded more smoothly than expected in nearly every district visited.[6] In the one district where disturbances had been severe, a community-wide committee of local citizens appointed by the mayor and the chairman of the local board of commissioners, in an official report, blamed the lack of support and leadership by the school board and community leaders for the continuing tension.[7] Moreover, contrary to the assumptions of many, the Commission found that: (1) The technical problems of desegregation are less formidable than was previously believed; (2) There is a sharp contrast between the reaction of communities to their own experience in desegregation and their expressed feelings concerning desegregation as a general proposition, particularly when the issue of busing intrudes; (3) Far from lowering the quality of education as some had predicted, desegregation had actually contributed to its improvement.

The last point is particularly significant in view of the questioning of many parents today about the quality of education their children receive in our public schools. In community after community, contrary to the widely held belief that integration would be achieved at the expense of the white majority, the Commission found that the shock of desegregation had actually forced administrators to take a look at the entire education program. Integration may well have sparked the kind of reappraisal of established practices that is essential to institutional self-renewal.

Additional evidence that school desegregation has had positive effects on students, both academically and attitudinally, was reported in a recent major study of the Emergency School Assistance Program (ESAP), which provides grants to school districts in the process of desegregating their schools. That study revealed that:[8]

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[6] "School Desegregation in Ten Communities," U.S. Commission on Civil Rights, Government Printing Office, June 1973.

[7] Report of Charlotte-Mecklenburg Community Relations Committee, March 14, 1972. Report on Charlotte-Mecklenburg, N.C. in "School Desegregation in Ten Communities."

(1) ESAP caused gains in academic achievement for black male high school graduates; (2) This achievement gain was attributable to the use of ESAP funds in ways that created effective changes in the way high schools handled racial issues; (3) Human relations programs seem to have been effective in improving the attitudes toward integration of urban white students; (4) Desegregation places considerable strain on students of both races, but schools can ease this strain by having staffs that support desegregation operating in a nondiscriminatory way and helping desegregation to proceed smoothly.

In addition to the ten district analysis and the ESAP evaluation, another report challenges numerous major erroneous assumptions about busing and school desegregation. One of the most intensive studies of school desegregation undertaken by the Commission involves Prince George's County, Maryland, one of the largest districts in the Nation and defendant in a case which attracted national attention.

Some preliminary findings in that report, now being concluded, are as follows: (1) Federal, State, and County action, not simply population shifts, perpetuated school segregation long after the *Brown* decision in 1954; (2) The district court demonstrated enormous patience with the school board, despite the obstructive tactics of the latter, in not only permitting but encouraging the board to design its own desegregation plan. Despite a formal request by plaintiffs, the court refused to impose a plan on the board; (3) A desegregation plan involving transfer of 33,000 students was implemented successfully at mid-year despite strong community opposition and predictions that chaos and confusion would result; (4) The black community in Prince George's County supported busing for desegregation as long as whites were also involved in a desegregation plan; (5) Achievement gains in reading, mathematics and language usage were reported in standardized tests given during the first semester of desegregation, reversing a previous trend; (6) Both black and white students indicated improvement in interracial understanding within months of implementation of the plan.

Finally, another study of desegregation in various districts noted that in Pontiac, Michigan, where violence had occurred at the start of its desegregation program, busing was reported "moving smoothly" and there was an absence of violence. In San Francisco, many parents reported that the desegregation program was running smoothly and that their children have been enriched by contact with youngsters of different races and backgrounds.[9]

These studies indicate that school desegregation is indeed worth the effort. The fact that the Fall 1973 school session was generally the quietest and most peaceful in the South in years indicated that it is.

The United States Commission on Civil Rights is interested in getting the facts as to the degree of progress—both cognitive and noncognitive—which has been made in the schools under desegregation, and how a community and its schools might become better prepared to carry out the Constitutional mandate. For that reason the Commission on Civil Rights has contracted with the Rand Corporation to design a longitudinal study which can be implemented over the next decade so that the Nation might know where it stands in this emotion heightened-ladened area. Hopefully, the result of this study will not only improve the transition period between segregated and desegregated schools, but will also aid in providing the keys to assuring successfully desegregated schools—where learning, individual growth and understanding does occur. To those who contend that the Nation's educational problems are continually inflamed by court-ordered busing, the reply must be that the pyrotechnics in an "unsettled" system are much more likely to come from the community's attitude than from busing itself. As the citizens' committee in Charlotte stated:[10]

"Thus, our first and firmest attention should be turned from discontent with the courts and hope of reversals of orders to our schools and the way in which they educate our children. The Committee believes that leadership from the Board of Education and from others—elected and private civic leaders alike—will cause this community's parents to reaffirm their belief in good education."

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[8] "Southern Schools: An Evaluation of the Effects of the Emergency School Assistance Program and of School Desegregation," Office of Education, Department of Health, Education, and Welfare, December 1973.

[9] " 'Busing' Success or Failure?" *U.S. News and World Report*, March 26, 1973.

[10] Report of Charlotte-Mecklenburg Community Relations Committee, March 14, 1972. Report on Charlotte-Mecklenburg, N.C. in "School Desegregation in Ten Communities."

Often one hears some of the students in a newly desegregated school say "If our parents would only leave us alone, we could work this out." What is needed today, as much as ever—at all levels of government and in communities and homes throughout the Nation—are essential steps to assure that desegregation will be accomplished calmly and effectively, and not the devotion of energy to last-ditch fights to turn back the clock.

From the South, where school desegregation has been most wide-spread, comes a message of special importance at this time of discord and controversy. A nationally known commentator, Mr. William Buckley, who long has been skeptical over the wisdom of passing laws to protect the rights of minorities noted the importance of desegregation to the well-being of our society. Writing about the abolition of segregation laws in Mississippi, he observed:

"The fact of the matter is that the end of Jim Crow hasn't increased interracial hostilities; quite the contrary. In the past four years Mississippi has achieved a racial integration unthought of in the North . . . and relations between white and black are, for the most part, altogether relaxed . . . Mississippi lost the right to pass its own laws respecting schooling, transportation, hotels and restaurants. And it is, without question, a better place to live in now than before."[11]

In short, our schools can play a key role in determining the future of American society. Schooling is universally felt to be the great avenue of equality and the test whereby communities or a Nation demonstrate the way in which they are headed. The United States Civil Rights Commission remains convinced that a pluralistic society cannot thrive without a deep commitment to a desegregated, and integrated school system.

CONCLUSION

Mr. Chairman and members of the Subcommittee, let me conclude by recapitulating momentarily. The Commission on Civil Rights is opposed to S. 1737 for the following reasons: Passage of S. 1737 would effectively bar Federal enforcement of the law and holdings of the Supreme Court regarding desegregation. The legislation would limit the authority of Federal courts to proscribe effective remedies that would achieve desegregated education and erode the present level of desegregation already achieved. Those provisions of the legislation which cut back on constitutional rights or which are doubtful exercises of the constitutional authority of Congress to legislate would force an unfortunate confrontation with the Federal judiciary. This situation, we believe, benefits no one.

The Commission believes that it would be a serious mistake for Congress to enact legislation which accepts the inevitability of school segregation, with its demonstrated denial of equal educational opportunity.

The passage of this legislation and any of the other measures which deal in one way or another with the subject of school desegregation, busing, and the jurisdiction of courts to hear these matters and to order effective remedies will represent the first regressive legislative action in the field of civil rights by the Congress in this generation. From reconstruction until 1957 no general action was taken by the Congress to require the implementation of the Fourteenth Amendment. Only in 1957, during the Eisenhower-Nixon Administration, just 17 short years ago, did the Congress decide to move toward enacting measures to grant full, first class citizenship to all the citizens of the Nation regardless of their race, color, religion, or national origin.

This Commission along with the millions of Americans who have for the past decade and a half applauded the various Civil Rights Acts overwhelmingly approved by a majority of both parties in Congress now have just cause to fear that if this and other similar legislation is passed, it will portend a new and fateful future for our Nation. If this legislation is successful in getting through this Congress, there is no reason to believe that attacks will not shortly come also on the laws now applied to remedy discrimination in employment, housing, public accommodations, and indeed, any other field in which discrimination and segregation had in the past been widely practiced.

The concomitant delimiting by Congress of the jurisdiction of Article III courts establishes a dangerous precedent for the future. Persons could create a majority coalition and seek to eliminate the jurisdiction in Federal courts to review cases involving fundamental civil liberties such as freedom of speech, assembly, religion, etc.

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[11] William Buckley, "Racial Relaxation in Mississippi." *Washington Star-News*, December 19, 1972.

None of us should react precipitously to repeal the progressive direction in which the Congress, the courts, and each President, have been moving for over three decades. There have been many times during this period when strident voices were raised against the implementation of the decisions of the courts and the laws of the Nation in the field of civil rights. A few have always stood in the doorways of schools, places of employment and public accommodation to defy those decisions and laws. Presidents and Congress did not then succumb to transitory emotions nor did they turn their faces away from their duty to make this Nation a whole Nation—a Nation, hopefully, where no man or woman would have cause to claim that he or she was being treated differently.

I appear before you today on behalf of the United States Commission on Civil Rights to urge that the record of the Congress since 1957 not be blighted by initiating a movement toward dismantling the progress of our generation, but rather to demonstrate to the Nation that the Congress is committed to strengthening the movement toward full and unquestioned equality for every citizen—a movement supported by the Constitution which you and I have sworn to uphold.

Senator ERVIN. You might identify those who accompany you, for the record.

Mr. HORN. Mr. Chairman, I am Stephen Horn, Vice Chairman of the U.S. Commission on Civil Rights and president of the California State University, Long Beach.

On my immediate left is Mr. Larry Glick, the Acting General Counsel of the Commission. On my right, is Mr. John Buggs, the staff director of the Commission; and to his right, is Caroline F. Davis, the Director of the Commission's Education Division.

Senator ERVIN. Thank you. We are glad to have all of you present.

Mr. HORN. Mr. Chairman, as I suspect you know, based on our testimony before on both the House and Senate side, the U.S. Commission on Civil Rights has consistently opposed such legislation as S. 1737 and related bills, which are now before your subcommittee.

We have testified a number of times before the 92d and 93d Congress on this so-called busing issue. In the testimony that Father Hesburgh, the former Chairman of the Commission, gave on July 28, 1972, I think he put it rather well when he referred to some of the then-pending bills which were fairly similar to those before you today, and said:

> That if this measure is designed to implement the 1954 decision of the Supreme Court, requiring desegregation of racially segregated schools, it fails. If it was designed to provide equal educational opportunities to the minority groups children of the Nation, it fails.
>
> If it was designed to move the Nation toward one society with justice for all, it fails. If it was designed to further factionalize the Nation along racial lines, it succeeds. If it was designed to deprive minorities of the equal protection of the law, it succeeds.

Mr. Chairman, I think those words are as applicable today as they were then when both Father Hesburgh and I were testifying before the House of Representatives. In our view, congressional action that limits school desegregation, would have a negative effect on racial relations in this country.

It would unsettle and thwart the development of constitutional law. It would condemn future generations to less than the best education that America has to offer. Indeed, it would not bring us together, it would divide us. And no matter how much choice is permitted, nothing will avail if our children, black, brown, yellow, red or white, are educated in isolation from each other and their ability to choose is limited by considerations of race and finance. The results of racial, ethnic, and social class isolation have been repeatedly documented.

In my statement, I have noted a number of points that have been made by the New York State commissioner of education, Mr. Nyquist, where he pointed out in testimony before the House that the results of current research clearly indicate that schools isolated on the basis of race may be decidedly harmful to the academic achievement of those students.

It must be said, too, that racial isolation is a part of the broader problem of social class isolation. Mr. Nyquist's department looked at the studies of 50 school integration programs and noted that, generally, they substantiate the positive effects of integration. And I think it is particularly important to note that they pointed out that when lower status students are transferred to schools with predominantly upper status students, the evidence suggests that continued residence in a lower status neighborhood will not interfere with the achievement gain that is to be expected by attendance in the schools with upper status students.

The legislation before this subcommittee will result in a declaration that national policy will henceforth tolerate racial segregation in our schools. S. 1737 and similar legislation can have no other effect than bringing an end to the continuing process of school desegregation.

In looking at the various provisions of S. 1737, we wish, also, to express our general opposition to S. 179, S. 287, S. 619, and S. 1737.

Our concern is that this would repeal title VI of the Civil Rights Act of 1964 and when we notice that under title VI between 1966 and 1970, about 202 districts in the South and border States, faced Federal fund termination as a result of a determination of noncompliance, and that because of this action plans were finally submitted to HEW, not as vigorously as many of us would have liked, but the results show that between 1968 and 1972, there was a decrease from 81.6 percent to 55 percent in the number of black students in the South attending 50- to 100-percent black schools, in other words, a drop from about 2.3 million to 1.7 million.

And we still have a continuing isolation of 1.7 million black students in Southern States. We have severe racial isolation, indeed perhaps more than in some areas, as Senator Stennis and Senator Ribicoff have noted for several years in the North and the West where, in 1971, over 70 percent of 2 million black students were attending 50- to 100-percent minority, or black schools.

As you know, in the recent decision of the Supreme Court of the United States in *Keyes* v. *School District No. 1* in Denver, and in other court cases, it has been clear that Northern and Western segregation is as deliberately imposed as segregation brought about in the South by State law.

I think that is a point that some of your colleagues have been making rather eloquently over the years. Our concern is that the Department of Health, Education, and Welfare has been unwilling to utilize the full force of title VI. We have been concerned that almost no reviews were conducted after 1971, which covered discrimination and student assignment, and in some cases, where racially or ethnically isolated. schools were identified, they were not required to desegregate these schools.

Title VIII of the education amendments of 1972, expressly prohibited the use of Federal funds for transportation or busing of students and teachers for desegregation purposes, certainly contributed to HEW's reluctance to require transfers of students for desegregation and to look at these problems on a school district basis.

We would hope that the case of *Adams* v. *Richardson* has reversed some of this where the court held that HEW was not performing the clear duty that Congress had mandated it to perform, and HEW is currently under court order to bring into compliance 197 school districts that were in the *Adams* decision.

We do think, however, that HEW has creatively used title VI to investigate in-school discrimination or discrimination which occurs in purportedly desegregated schools.

We are particularly concerned about S. 1737's reliance on desegregation by freedom of choice. For almost a decade, this Commission has studied the so-called freedom of choice plans. We have found that generally they fail to bring about the desegregation that the court in the *Brown* decision has declared is a constitutional right.

In our 1969 report, "Federal Enforcement of School Desegregation," we sampled various Louisiana school districts and noted there that they had freedom of choice plans that had failed to bring about meaningful change.

So we have concluded that freedom of choice plans remove from the school boards the responsibility for desegregating and places an unfair burden on minority parents for the selection of schools for their children. We cited numerous instances where selection of white schools by black parents subjected these parents and their children to violence, intimidation, harassment, economic coercion by white students, teachers and school officials.

Therefore, we feel that this is not a proper course, either constitutionally or as a matter of commonsense in public policy. Of course in the *New Kent County* case, the court, in 1968, found that the freedom of choice plan was not acceptable, per se, unless it resulted in the abolition of the dual school system.

When we look at S. 1737, we feel that there is an unconstitutional abridgment of certain rights that are protected by the XIV amendment, and I am sure that this argument is familiar to you, Mr. Chairman.

Certainly the *Brown* and the *Green* cases declare that dual school systems are violative of the equal protection clause and that they must be disestablished, not only with all deliberate speed, but immediately.

That, of course, was *Green*, in 1967. The reliance on S. 1737, if passed, would certainly override fundamental constitutional rights. I think Justice Brennan's comments in the *Green* case are apt when he said "such delays are no longer tolerable for the governing constitutional principles no longer bear the imprint of newly enunciated doctrine."

We are also concerned that S. 1737 would place an unconstitutional restriction on the jurisdiction of the Federal courts in the sense that section 1207 of the student Freedom of Choice Act removes from the jurisdiction of the Federal courts, the authority of those courts to fashion desegregation remedies and to enter orders accordingly.

Obviously, the first question is whether Congress has the constitutional authority to deny Federal courts the power to decide desegregation cases and to issue implementing orders. The Commission is of the opinion that Congress does not have that authority.

The Constitution requires the desegregation of public education. And although the constitutional right to desegregate would remain, the fact would also remain that the enacting of S. 1737 would render it a right without a remedy.

Perhaps you have had a chance to read the article by Representative Frank Thompson and Prof. Daniel Pollitt of the University of North Carolina School of Law? I think the points are made rather well in that article that:

> A right without a remedy is like a bell without a clapper. It is an empty promise demeaning to the judge, breeding cynicism and disrespect for the process of law. This attempted dichotomy has no place in our Constitutional heritage . . . The opposite has been the law since, and even before, the landmark decision by Chief Justice John Marshall in *Marbury* v. *Madison*.

We have always recognized in American constitutional law, the power of the courts to issue remedial orders as an essential ingredient of the judicial power of the United States. There is also a fundamental principle, certainly from 1803 and even before in some unreported cases, that no branch of government can circumvent or violate the Constitution by doing indirectly what it is forbidden to do directly. That is firmly entrenched in constitutional law.

Segregated education is an outlaw. The Congress is constitutionally precluded from doing anything that would foster segregation, and certainly the adoption of S. 1737 would be a congressional stamp of legitimacy for these freedom of choice plans.

And Congress, thus, would aid in trying to undermine the Constitution of the United States. There is also concern on my part as to the congressional authority to really affect the jurisdiction of the various inferior Federal courts. We feel it is a settled principle, reviewing the cases that Congress may not restrict the jurisdiction of the courts if, by so doing, constitutionally protected rights will be abridged or rendered unenforceable.

Judge Chase, in the second circuit, in the *Battaglia* case, which was the portal-to-portal pay case after the Second World War, noted in part of that opinion that while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts, other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty or property.

In other words, 5th amendment rights, 14th amendment rights, and of course, that is our concern in this case. The cases as Representative Thompson and Professor Pollitt noted, strongly indicate Congress has no power to withhold or restrict the jurisdiction of the inferior courts when the withholding or restriction of that jurisdiction would deny persons the property rights guaranteed by the fifth amendment.

Now I think we ought to spend some time separating fact from fiction as to how desegregation is working. There is no question in our mind that legislation now being considered by the committee would reverse the Nation's commitment, long delayed, and now still too long delayed, in implementation to desegregate our schools.

Much of the public confusion and misunderstanding about desegregation results from the fact that its results are not easily measured. There is no question that busing is a hot potato. We have talked to many Members of Congress, Members of the U.S. Senate, there is no question that this is an emotional issue.

But our concern is to support the Constitution and a legal position and to try and create an atmosphere in which reason is not doomed. The Commission believes that we can be most helpful and aid the public interest with respect to this issue by an empirical approach as opposed to political expediency.

When I testified before the House Committee on the Judiciary on May 10, 1972, I cited numerous studies which clearly reveal that far from damaging or impinging on the educational process, busing has clearly permitted many school districts to offer all their children demonstrative positive gains, both academic and attitudinal.

Additional studies by the Commission and other organizations in the past year and a half suggest that school desegregation is working and that most of the fears and anxieties about busing have been proven groundless.

We released in June of last year a 10-community study which found community by community that desegregation is proceeding more smoothly than was expected.

Senator ERVIN. Incidentally, this Civil Rights Commission some years ago produced a study which reported that the people in Clay County, N.C., were discriminating against blacks because there were no blacks registered to vote in the county. It turned out that there were no blacks residing in the county. So I do not have as much respect for some of those studies as some other people.

Mr. HORN. I must say, Mr. Chairman, that study was before my time. I would be glad to go back and visit Clay County. I have been to Hoke County, I have not been to Clay County.

Just recently there was an article by Louise Cook of the Associated Press which was headlined "Fights Over School Busing Generally Faded Away," this was dated February 7, 1974, and reviews many of the cities in the South where progress is being made.

When we look at these 10 communities studied by the Commission this is based on interviews with school officials, mayors, city people, students, teachers and so forth, we found generally that the technical problems of desegregation are less formidable than previously believed. We found that there was a sharp contrast between the reaction of the communities to their own experience of desegregation and their expressed feelings about desegregation as a general proposition, particularly on the issue of busing. Far from lowering the quality of education, as some predicted, desegregation had actually contributed to its improvement.

The Commission, of course, realizes that the shock of desegregation in many cases has forced administrators to look at the entire education program and integration may well have sparked the kind of reappraisal of established policies that is essential to institutional self renewal.

Recently there has been a major study of the emergency school assistance program, ESAP. That study which was done by the Department of Health, Education, and Welfare's Office of Education, showed that under that program there were gains in academic achievement for black male high school graduates.

The achievement gain was attributable to the use of Federal funds, ESAP funds, that created effective changes in the way high schools handled racial issues. Human relations programs seem to be effective in improving the attitudes of urban white students. Desegregation places considerable strain, of course, on students of both races. But the schools can ease this strain by having staff to support desegregation operating in a nondiscriminatory way.

As I mentioned earlier, Mr. Chairman, I visited Hoke County in your State of North Carolina, in 1970. I think that is a splendid example of desegregation where the school board acted before HEW or the Federal courts acted and Federal money there was very helpful in helping to educate teachers, counselors, and administrators in attitude changes leading to desegregation.

There was a situation where black students were in the majority, whites were in the minority, about 15 percent were Lumbee Indians.

The Commission has been recently deeply involved in studying what has occurred in Prince Georges County, Md. We are about to issue a report on that. Some of our preliminary findings are that Federal, State, and county actions, not simply population shifts, perpetuated school segregation long after the *Brown* decision in 1954. We felt that the district court demonstrated enormous patience with the school board—despite the obstructive tactics of the school board in not only permitting but encouraging the board to design its own desegregation plan. Despite a formal protest by the plaintiffs, the court refused to oppose a plan of the board.

The desegregation plan that involved 33,000 students was implemented successfully in midyear despite strong community opposition and predictions of chaos and confusion which would result. Recently the board issued a press release on the achievement gains in reading, mathematics, language, and word usage in the first semester.

Certainly the black community in Prince Georges County supported busing in Prince Georges County as long as the whites went with the desegregation plans.

Pontiac, Mich., that has been a source of controversy, we have found that despite the emotional atmosphere, that occupied the transition to desegregated schools, the busing program was moving smoothly and in absence of violence.

You mentioned San Francisco in your questioning to the previous witness. Many parents there reported that the desegregation program has been running smoothly. The children have been enriched by contact with youngsters of different races and background. Indeed, when you look overall, despite the temporary scare headlines that occur in almost every community, since news is conflict, not the good men do, this school session has been the quietest and most peaceful in the South, certainly, than any year since 1954.

We are interested in getting the facts, as I am sure you are, Mr. Chairman. And I am sure that the Congress is interested, as I am sure you are, and the American people are, as to the degree of progress both cognitive and noncognitive that has been made in the schools due to desegregation.

We are interested in how a community and the schools might be better prepared to carry out the clear constitutional mandate. For that reason, the Commission, 6 or 7 months ago, contracted with the Rand Corp. to design a longitudinal study which can be implemented over the next decade so the Nation might know where it stands in this emotion-heightened and emotion-ladened area.

Hopefully, the result of that study will not only improve the transition period, between segregated and desegregated schools, but will also give us some advice and some clues as to how we can aid these schools in ensuring successful desegregation where learning and individual growth and mutual understanding can occur.

Recently, in some of our studies, we looked again at Charlotte. The Citizens Committee there I thought put it very well when it said "the first and firmest attention should be turned from discontent with the courts and the hope of reversals of orders, to our schools, and the way in which they educate our children."

That, of course, is one of our major concerns, that the continued debate on this in Congress is undermining the effective progress that has been made in schools throughout the country. It is giving some of the bitter-enders hope. We heard no wails for 100 years when black students were bused right by the white school which was one block from their homes, to schools, 20, 30 miles away.

We heard no wails then about forced busing. And when I look at my own childhood, since I was bused 50,000 miles, as a rural Californian, to get an education, I realize that most busing in this country where, as you know, Mr. Chairman, 40 percent of the children have been bused for the last three decades, about 4 percent of the total public school budget was spent in busing. Most busing has occurred in this country for school consolidation and has given people a better education and I know if I did not have that 50,000 miles of forced busing, I would be picking apricots in San Juan Bautista, Calif.

And when I last looked, the apricot trees were dead and that I think will be the fate if we deny to a generation long after we should, an opportunity for a decent education.

Mr. William Buckley made a rather interesting comment after his visit to Mississippi. He said "the fact of the matter is that the end of Jim Crow hasn't increased interracial hostilities" and he thought, looking at the improved relations between whites and blacks in Mississippi, where Mississippi lost the right to pass its own laws respecting school transportation, hotels and restaurants, he concluded that Mississippi " * * * is without question, a better place to live in now than before."

There is no question that schooling is felt to be a great avenue of equality and the test whereby communities or nations demonstrate the way in which they are headed. We certainly believe, as I think the Constitution clearly indicates and the court decisions under that Constitution, that this is a pluralistic society and that we cannot thrive without a commitment to a desegregated, integrated school system.

In summary, the Commission is opposed to S. 1737 and its related companion measures for a number of reasons. One, because it would bar the Federal enforcement of the law and the holdings of the Supreme Court of the United States, regarding desegregation.

Two, it would limit the authority of the Federal courts to proscribe effective remedies and indeed it would force an unfortunate confrontation with the Federal judiciary. We do not think this situation benefits anyone in this country.

The Commission believes it would be a serious mistake for Congress to enact legislation which accepts the inevitability of school segregation with its demonstrated denial of equal educational opportunity.

And it would be, as I think we are all aware, the first regressive legislative action in the field of civil rights, by Congress in this generation.

As you will recall, only in 1957 during the Eisenhower and Nixon administrations, 17 short years ago, did the Congress move to grant full-class citizenship to all citizens, regardless of their race and color, religion or national origin.

And certainly if this legislation is passed it is going to portend a new and fateful future for our Nation. We have no reason to believe, if this measure is successfully adopted, that somebody will be proposing measures to limit the Federal courts and the Equal Employment Opportunity Commission, in the areas of employment, housing and public accommodations. We will be back where we were in *Plessy* v. *Ferguson*, in 1896, with all the heartache and pain in uneducated millions that that resulted in.

We think the delimiting by Congress, of the jurisdiction of article III courts establishes a dangerous precedent for the future. We are concerned about such other civil liberties as freedom of speech, assembly, and religion. Of course, strident voices have been raised against implementation of the decisions of the courts. Strident voices have been raised throughout our history in these matters. A few have always stood in the doorways of schools, although I must say I was rather amused a few weeks ago to note Governor Wallace, who had stood in the doorway of the school at the University of Alabama, showed up 10 years later to crown the student who happened to be black who was made a beauty queen. So I guess progress does occur even when you stand in front of school doors. Presidents and Congress did not succumb in the past to transitory emotions, nor did they turn their faces away from their duty to make this a whole Nation.

Mr. Chairman, on behalf of my colleagues, five citizen commissioners, and the staff, we urge that the record of this Congress, since 1957, not be blighted by initiating a movement toward dismantling the progress of this generation, but rather to demonstrate to the Nation that Congress is committed to strengthening the movement toward full and unquestioned equality of every citizen, a movement supported by the Constitution which both you and I have sworn to uphold.

Senator **Ervin**. I issue you the same challenge that I issued to one or two members of the faculty at the law school of the University of North Carolina and distinguished lawyers. To find one decision of the Supreme Court which holds that Congress does not have the power to define the jurisdiction of the Federal courts, except with respect to the original jurisdiction of the Supreme Court.

There are scores and scores of cases to the contrary.

Mr. **Horn**. There is no question, Mr. Chairman, that Congress can change the jurisdiction of the inferior courts, and it has. But there have also been a long line of cases that point out in court decisions when they have accepted that congressional act as to changing their jurisdiction, that such a change cannot deny fundamental constitutional rights.

Let us take *ex parte McCardle*, as I recall, after the Civil War and the Reconstruction period and others—I mentioned Judge Chase of the *Battaglia* opinion. There is no question that the court has made it clear that Congress can change lower court jurisdiction as long as a constitutional right is not involved.

Here a constitutional right is involved.

Senator ERVIN. You referred to a provision in the Constitution that the Federal Government or the State is prohibited from denying a person life, limb, or property without due process of law. Yet, when OPA was established in the Second World War, Congress denied the right of any person to contest the validity of a regulation in a criminal trial. A man was indicted for violating a regulation put out by the OPA. He claimed that it deprived him of his liberty and his property in violation of the due process clause of the fifth amendment.

Even in that case the Supreme Court held that that statute which denied him the right to set up that clause of the Constitution as a defense to a criminal charge was perfectly valid and he could not invoke the Constitution.

I have the decision in the *McCardle case*—here in my hand. McCardle was a newspaper editor in Mississippi. He criticized the Reconstruction policy and the presence of the military in Mississippi in editorials in the exercise of his liberty under the due process clause, and in the exercise of his right of freedom of speech and the freedom of the press under the first amendment. He was a civilian who had no connection with the military. He was arrested by the military and confined by the military which was prepared to try him before a military court.

Just a year or so before, the Supreme Court had the case of *ex parte Milligan*, where a civilian was tried before a military court and sentenced to death. The Court held that that was unconstitutional in that it deprived him of virtually all of his rights under the Bill of Rights—the right of trial by jury, of indictment by a grand jury, and other rights. And that was certainly a constitutional right.

This man in Mississippi, in the *McCardle* case, suffered a great deprivation of constitutional rights. The Congress had passed a law allowing appeals in habeas corpus cases where a constitutional right was involved. This man was released on habeas corpus on the ground that they were violating his right to indictment by a grand jury; and trial by a petty jury; trial in a civil court, as distinct from a military court; his right of freedom of speech; his right of freedom of the press; and his constitutional right to liberty.

The case was even brought to the Supreme Court of the United States and argued here. And after the arguments were held and before the decision, Congress passed a law saying that the Court should not have jurisdiction on an appeal on habeas corpus proceedings.

Then in the case they pointed out that the appellate jurisdiction of the Supreme Court is conferred with such exceptions and under such regulations as Congress may make. And so they said they had no jurisdiction because Congress had taken it away from them after conferring it upon them.

There is not a single case that holds that when a constitutional right is involved, Congress cannot regulate the jurisdiction of the Federal courts. As a matter of fact, the Federal courts are denied jurisdiction of more cases arising under the Constitution, the laws, and the treatises of the United States than they are allowed to entertain. That is done by the simple expedient of requiring the amount of $10,000 to be involved in a case or controversy.

Mr. HORN. Mr. Chairman, have you had the opportunity to look at the article by Professor Pollitt and Representative Thompson that is entitled, "Congressional Control of Judicial Remedies: President Nixon's Proposed Moratorium on 'Busing' Orders"?

I would be glad to submit that for the record.

Senator ERVIN. I read the article. I also read a book by another distinguished college professor and it says the Constitution does not mean what it says.

Here is what the Constitution says. "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish:" That is section 1 of article 3.

The Supreme Court of the United States has held in case after case that Congress can proscribe the jurisdiction of all the courts they create. You can give it jurisdiction one day or take it away the next.

And then it says this about the jurisdiction of the Supreme Court, "In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned"—that is, cases arising under the Constitution, laws, and treatises of the United States, "in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Those words of the Constitution are so plain that all the college professors in the United States cannot reason them out of existence. And the Supreme Court of the United States has recognized that time after time after time.

Mr. HORN. Mr. Chairman, if I might respectfully argue another point here.

I would, one, like to introduce the article from the North Carolina Law Review into the record, because it is pertinent to this discussion. You will find that Representative Thompson and Professor Pollitt in that article lay out various approaches to this problem, including the discussion that occurred in the Constitutional Convention of 1787 in Philadelphia, where as with so many things in the Constitutional Convention, this particular section of the Constitution, those particular words, were a compromise that really related in the history of the Convention, as I recall it, to assurance to the States that the Federal courts would not tamper with the factual situations found by juries. And Patrick Henry in the Virginia Constitutional Convention made that argument. Alexander Hamilton made that argument in the Federalist.

It was made on the floor of the Convention that that was compromise language to say that Congress would limit the Federal court action so that the findings of fact by a jury would not be overthrown by the Federal courts. That is the origin of that particular phrase.

Now, as you know, over the years the Supreme Court of the United States and others interpreting the Constitution have had many approaches to this. There is the plain meaning of the words, which is the approach you are taking. There are the views of the Founding Fathers and the framers. There is the sort of reconciliation of new facts as they come up and problems in society over time with the spirit of the Constitution.

We do not have to go back to John Marshall to know that the Constitution is a living document. That is why this Nation has survived. We are not limited to what America was like in 1787 and 1789.

If I might, Mr. Chairman, I would like to put this article in the record, because it goes into this history as well as the *McCardle* case, as you mentioned, as well as going back to a note in *Hayburn's* case in 1792.

And it makes the point—let us go back to the *McCardle* case for a moment—that the court did say that Congress had the right to do what they did in that act, but it pointed out in its opinion that Congress still had not overruled the court's appellate jurisdiction in the Judiciary Act of 1789.

I think it is very important that we lay this record down, so that when your colleagues review the record, they will have the benefit of this.

Senator ERVIN. I have read a lot of those articles. One of the greatest intellectual feats in the academic world is to write a law review article indicating that the Constitution does not mean what it says. I have had some articles from those same professors on another subject. I had quite a hearing before the Separation of Powers Subcommittee when a professor came up and said that Congress could not proscribe the jurisdiction of the Federal courts so as to deny them the right to pass on a constitutional claim. He said that was so because the separation of powers doctrine, separating powers between the judiciary and the legislative branch, and also because of the supremacy clause.

So he held forth very learnedly for about 45 minutes. At the conclusion of his statement, I said,

> I think I can demolish your argument in about 5 minutes. You say that Congress cannot deprive a Federal court of the power to pass on the constitutional question on account of the separation of powers doctrine.

I said,

> The trouble with that argument is article 3 of the Constitution separates the powers of Congress, and of course, in respect to proscribing the jurisdiction of the Federal courts and the appellate jurisdictions of the Supreme Court, it separates those powers and gives the power to Congress, and separates it from the judiciary.

He said there is also the supremacy clause. But, the supremacy clause does not say all this Constitution except article 3, but this Constitution including article 3. An act of Congress passed pusuant to the Constitution and treaties that shall be made on behalf of the United States shall be the supreme law of the land.

So article 3 is very plain. John Marshall repeatedly stated that when men make agreements, they ordinarily select the words that best express their agreement. So that the men who wrote the Constitution must be deemed to have meant what they said.

I am very familiar with this argument that the Constitution is a living document. It is a living document.The powers that it grants extend to the future; and the limitations it imposes do the same thing.

If the Constitution as a document can be construed one day to mean one thing, another day to mean another thing, the Constitution is not a living document; on the contrary, it is a dead document.

Mr. **Horn.** Mr. Chairman, if I might just make two points, and I would like to yield to our General Counsel. You say there are no cases that discuss this jurisdiction question. As I referred in my printed testimony, there are a series of decisions in the portal-to-portal pay cases where certainly the circuit judges in handing down their decisions—be it Judge Parker in the fourth circuit, Hicks in the sixth circuit, or Chase, who I quoted, in the second circuit—have made the point that that question—in this case the portal-to-portal pay—whether there was a vested right in an employee to get overtime pay under the Fair Labor Standards Act the minute he passed the portal of a particular plant.

That question as to a constitutional right did not arise, and they had no problem in deciding that the Congress had a perfect right to remove the courts from jurisdiction over this question since it was really a statutorily created right.

I cited Judge Chase where he said in his opinion on this that "we think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the fifth amendment."

And it would seem to me that whether you start with John Marshall, nowhere in the Constitution does it say that the Supreme Court of the United States can declare acts of Congress unconstitutional; but it certainly settled constitutional law——

Senator **Ervin.** I disagree. It says this Constitution and the acts that Congress passed pursuant thereto shall be the supreme law of the land. That says that an act of Congress that is not passed pursuant to the Constitution is not a law of the land.

Mr. **Horn.** I am delighted we agree on that, and I would agree that this 1737 and related bills, if passed, are repugnant to the Constitution just as enacting a legislation passed under the implementing clauses of the 14th amendment, the reconstruction amendment, which would diminish the rights granted by that basic constitutional amendment, would be repugnant to the Constitution and would have to fall on that basis.

Senator **Ervin.** I am glad you are invoking Judge Parker, because Judge Parker tried the *Kearnan County* case, one of the cases involved in the *Brown* case. When it went back to the district court—the three-judge district court—Judge Parker said something that is as clear as a noon day's sun in a cloudless sky. He said that the *Brown* case did not require desegregation. It merely prohibited discrimination. And he said that whenever a school board opened all of the schools in its jurisdiction to children of all races so that they were free to attend any school that their parents selected, it was in full compliance with the *Brown* case and in full compliance with the 14th amendment.

Now, I recognize that subsequently, the courts have repudiated that doctrine. But, it has been repudiated in the face of these words that Congress passed in implementation of the *Brown* decision.

I will read from section 401, subsection (b) of title 4 of the Civil Rights Act of 1954 dealing with desegregation of public education. This was passed by Congress to implement the *Brown* case, and it says, "Desegregation means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin."

I think that is the correct interpretation of the *Brown* case. What do those words mean to you?

Mr. HORN. They mean what the Supreme Court of the United States has said in the *Swann* case and others; that that language, as my understanding the language as being here at the time——

Senator ERVIN. Leave the Supreme Court out. You tell me what you think those words mean.

Mr. HORN. My understanding at the time was this primarily applied to de facto school desegregation decisions. The Court has never said you must have racial balance in the school. They have merely said that it is proper for the Federal district court to look as a starting point at what the ratios are to see if an affirmative, good faith compliance has been made with the mandate of the Constitution to desegregate the schools.

Senator ERVIN. This says in about as plain English that can be found that "desegregation" means assignment of the students to public schools without regard to race, color, religion, or national origin. In other words, that means—in plain English—that they shall not take these factors into consideration at all in assigning the children to public schools, but that they shall ignore them.

If it does not mean that, it does not mean anything. I will agree with you that in the *Swann* case, when the Supreme Court was confronted with these words, that the Supreme Court did something which was repugnant to every judicial opinion I have ever read. All other judicial opinions say that when you are interpreting an act of a legislative body which is susceptible to the interpretation that it applies to something that the legislative body has a constitutional right to legislate with respect to, and also with respect to something the legislature has no constitutional right to legislate, the Court will construe it to apply to something with respect to which the legislative body has a right to legislate.

I was in the Senate when this passed. The legislative history shows clearly that this was intended to implement the decision of the *Brown* case, which merely prohibited discrimination and did not require desegregation. So it defined desegregation in that fashion.

When the Chief Justice wrote the opinion, he was confronted with this act of Congress, so he nullified the act of Congress by saying that Congress acted like a bunch of legislative fools and undertook to legislate with respect to de facto segregation caused by residential patterns. The Chief Justice held that Congress had not intended to legislate with respect to the only thing that it legislate with respect to—that was excluding children from schools because of race.

Mr. HORN. As you know, in Chief Justice Burger's opinion in *Charlotte* v. *Mecklenburg*, he said that with any equity case the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, the district court has broad powers to fashion a remedy that will insure a unitary school system.

Senator Ervin. I will have to say this. The Constitution was written to establish a government of laws—a government in which the conduct of people and the officials should be controlled by certain, constant, and uniform laws, rather than by the inconstant, uncertain, and arbitrary whims of men that occupy public office.

The decision in the *Swann* case is to the effect that a district judge can exercise discretion undisturbed by law. He could do what he pleases in establishing a government of men, not of laws.

Mr. Horn. I do not think the Supreme Court said he could do what he pleases. They laid some guidelines, as you recall, as to the health, safety of the child, and the age of the child.

Senator Ervin. They also said they were interpreting the equal protection clause. And, in doing so, instead of having equal protection under the law, created one law for the South and another law for the North, all in the name of equal protection of the laws.

They said that a Southern State which had segregated schools, in conformity with the decisions of the Supreme Court prior to May 9, 1954, would be presumed to be guilty of discrimination without any evidence of that fact. If the races were not mixed in those schools in proportions, satisfactory to the notions of the Supreme Court Justices, a similar school with exactly the same ratio in areas outside the South, where there had been no segregation at the time of the *Brown* case, would be perceived to be innocent until it was affirmatively shown to be guilty.

We have some monstrous things in that case. We have unequal laws created by the Court professing to be enforcing the equal protection of the laws clause.

Mr. Horn. Mr. Chairman, I do not think the Court acted any differently than the Congress of the United States. Both of us were here in 1965 when the Voting Rights Act of 1965 was passed. And there was an assumption of positive finding by the Congress as to where deprivations of the right to vote, based on past laws, that essentially deprived Negro citizens of the right to vote had occurred; that certain things would happen; and that you would have to, in a sense, reverse of what we often think—you are innocent until you are proven guilty. Their findings showed that there was a clear record over the years of such discriminatory statutes. You have the same situation here.

Senator Ervin. That was clearly a bill of attainder. It was establishment of guilt by legislative action without a trial. The Court got around that also by saying that the prohibition of the bills of attainder do not protect States or officers of States or citizens of a State.

I do not want to get diverted an another matter. Let us stick to the schools.

Mr. Horn. Let me yield to Mr. Glick, if I might.

Mr. Glick. I would like to address the jurisdiction question we were discussing a moment ago from a different angle. I am thinking specifically in terms of that 1737. In the definition, section 1201(g), the proposed legislation clearly recognizes that there is a 14th amendment right on the part of students to attend schools without regard to race.

It says, "Freedom of choice school is a school in which public school classes are open to students of all races." So clearly, that right is recognized.

And the freedom of choice kind of remedy for segregating school systems was found by the Court in the *Green* case very clearly not to be effective.

Senator ERVIN. That case is enough to shake anybody that has the slightest love for freedom. The Court held in that case that the county had two schools, and that every child of every race would be allowed to pick their own schools. The Supreme Court held, in substance, in the *Green* case, that children could have freedom of choice. They could be free like other Americans as long as they exercised their freedom in a manner pleasing to the undefined notions of the Supreme Court Justices; but that when they exercised their freedom in a manner displeasing to the undefined notions of the Supreme Court Justices, they should have no freedom.

Mr. HORN. I am glad you mentioned that case. It is a prime example of the point I made earlier. We did not hear the wails of individuals on forced busing when New Kent County School Board had been busing students from one end of the county to the other in order to get an education. We did not hear any wails about the energy crisis.

Now we hear them. The fact was that they had discriminated 99.9 percent in doing this and what the Court is trying to do is undo it.

Mr. Glick, do you want to continue?

Senator ERVIN. I am glad you brought that up. There are several kinds of homicide and there are several kinds of busing. Whether one is right or wrong depends on motivation. If I deliberately murder a person, my motivation makes me guilty of murder. But if I defend myself against somebody who is about to inflict death or serious bodily harm on me, my motivation to defend myself makes that justifiable homicide.

Now, there are two kinds of busing. There is one kind of busing which is done for educational purposes—that is, to enlighten the minds of school children. That kind of busing is done for the necessary purpose of transporting the child from his home to the nearest school available to children of his age, and scholastic attainment.

The other kind of busing is done not for the enlightenment of the mind, but for the integration of bodies. In that case, it is transporting a child away from the school nearest his home available to children of his age and scholastic attainment merely for the purpose of either decreasing the number of children of his race in a neighborhood school or increasing the number of children of his race in schools elsewhere. In my judgment the distinction between these two kinds of busing is as wide as the gulf between Nazareth and Abraham's bosom and diverse as well.

Mr. HORN. Mr. Chairman, listening to your description of enlightened busing, I assume that you supported the Court in *Green* v. *New Kent County.*

Senator ERVIN. I did not.

Mr. HORN. There they are trying to overcome the fact that these buses were tripping over each other in intersections taking the children to the opposite ends of the county.

Senator ERVIN. The equal protection clause of the 14th amendment was put into the Constitution to protect people against tyranny at the hands of the state. In the *New Kent County* case, the Supreme

Court perverted it into an instrument to justify tyranny against little children of all people at the hands of the Federal Government.

Judge Parker said in the explanation of the *Brown* decision, that nothing in the decision of the *Brown* case deprived people of their freedom. It just prohibited the exclusion of a child from a school on account of his race.

Mr. HORN. As you will recall, Mr. Chairman, there were 21 school buses in New Kent County, 11 serving 1 school, 10 serving the other and they were traveling overlapping routes, practically bumping into each other. If you were white you got on one bus. If you were black, you got on the other bus, and you did not go to the school nearest your home.

Senator ERVIN. In that case Justice Brennan said, in effect, freedom of choice was all right if the freedom was exercised in a manner pleasing to the undefined notions of the Supreme Court Justices but was all wrong if freedom of choice was exercised in a manner desired by the people that were supposed to have freedom.

Mr. HORN. As you know, Mr. Chairman, there has never been any law laid down in this country, really, that the parent is the one who decides where his child goes to school. There is consistent law in Northern and Southern States, from the end of the Civil War, and we had very little public education at that time, that it is the school board basically that makes that decision. If they want to wipe out the one room school, which is what they did in my area about a year before I went to first grade, they are going to bus you.

Senator ERVIN. The Supreme Court of the United States in the case of the Society Sisters against Pierce, held that a child could not be compelled to go to a public school; that he could go to a private school selected by his parents. So the government does not have the right to tell children to go to public school. To be sure, school boards may assign children to schools in order not to overtax facilities, but the assignment of children in schools according to the whims and the caprices of Supreme Court Justices is without constitutional foundation.

You and I disagree fundamentally. I believe in freedom and that freedom of choice is in perfect harmony with the equal protection clause. That is the reason in my bill that I require abiding by the Constitution and provide that if a school board abides by the Constitution and gives freedom of choice, the Federal Government has no further business in the matter.

Mr. GLICK. If I may continue for a moment, I think the principal holding in *Green* was freedom of choice was OK, but it had to be within the framework of the disestablishment of a dual school system, and the Court found in that particular case that freedom of choice did not, in fact, disestablish dual school systems, and repeated cases have found that, in *Adams* v. *Richardson*, the most recent case in which HEW was sued, it was found that most of the school districts that were not in compliance were schools that once had freedom-of-choice plans.

So I think it is quite clear in indicating that freedom of choice does not disestablish dual school systems.

Now, moving forward from that, what the Court really has come to say is that the courts in their equitable jurisdiction, the Federal courts, have the authority, the jurisdiction, to fashion a remedy to establish what is required by the 14th amendment, and this bill recognizes, as you indicate, that the 14th amendment, the equal protection clause, is supreme.

What the bill does, in fact, however, is give Congress the authority and does, in fact, by Congress establish the one and only remedy available for 14th amendment rights. I think, and I do not mean to be facetious when I do this——

Senator ERVIN. I do not think you are being facetious. I think you are almost agreeing with me.

Mr. GLICK. In support of the position that I am taking, that Congress is going too far in establishing the only remedy, I would like to cite and quote from an eminent constitutional authority, to wit: Senator Sam Ervin. As I say, I am not being facetious, sir. You were saying at some hearings before this committee in 1966 on S. 2097, a bill to provide for judicial review of the constitutionality of grants or loans under certain acts, in a colloquy with a Mr. Douglas who was, I think, an Assistant Attorney General, you said with respect to the English system, "Of course, in the English system Parliament is supreme and is subject to no limitations whatsoever, but do you not believe that the very genius of our system of government is the fact that we have a system of checks and balances, and that the power to interpret the laws, which includes the power to interpret the Constitution, is vested in the courts as the primary power." The interpretation of the Constitution must obviously, it seems to me, include the right to determine what the Constitution requires as remedy for deprivation of constitutional rights, so that I think that the bill as proposed, the bill as proposed makes Congress the determiner of what remedy is and not the courts.

Senator ERVIN. Do you not agree with me that a freedom of choice system is perfectly constitutional?

Mr. HORN. Mr. Chairman?

Senator ERVIN. I was asking Mr. Glick.

Mr. GLICK. Sir, if we had a 200-year history of freedom of choice plans that indicated that dual school systems did not exist under them, I think I might be inclined to say yes. We do not, though, and I do not think we can ignore the history.

Senator ERVIN. What is a unitary school system?

Mr. GLICK. A unitary school system, as the Court said, is one in which there are no white schools nor black schools, but only schools.

Senator ERVIN. No. The Supreme Court has held in all its recent decisions that a unitary school system is a system in which no person is denied admittance to a public school on account of his race. That's what it says. That is what a unitary system is. A unitary school system is a school system in which no person is denied admittance to any school on account of his race.

Now, when you have a freedom of choice system, nobody is denied admission to any school on account of his race, and it is a unitary school system.

Of course, if you are gong to adopt the theory that our Constitution is such a nebulous document that the Supreme Court Justices have a right to mix children in schools to satisfy their personal notions and deprive them of freedom to effect that purpose, you reach another conclusion.

Mr. **Horn**. Mr. Chairman, if I might comment on that. As I tried to say in my testimony and other responses to questions, if freedom of choice is expected to be a remedy, to guarantee a clear constitutional right to an education in a nondiscriminatory manner, it fails, based on its history, because the facts of the history are, in the post-*Brown* period, as our studies show based on the interviews in the South, letters, complaints, court cases, administrative hearings before HEW, the whole Federal gamut of review, monitoring agencies, that it is meaningless to say that you can get a nonsegregated education by having freedom of choice, when you find that the parents are often fired from their jobs, when the students are harassed, when there is violence and intimidation. It is holding up an expectation that can never be met. It is a completely phony remedy.

Senator **Ervin**. It is not nearly as phony as, in the land of freedom, saying that people can have freedom, provided they exercise freedom in a manner satisfactory to the powers that be or otherwise they cannot have their freedom.

Mr. **Horn**. This is putting the burden on the people who have not had freedom to go beyond what the burden ought to be on all students. When you have this kind of choice that goes outside what ought to be proper public policy to carry out the Constitution, it leads to nothing but difficulties. There is no question that some black parents are as concerned as some white parents as to "forced" busing, but the reason they are concerned is that in many of these areas, the busing responsibility has been on the black student more than the white student.What the courts are trying to do, as Mr. Glick indicated, in their decisions is to get this country and this society to a state where we are talking about just schools, but to do this, you have to overcome a century legacy of conscious de jure segregation. As you see now in the *Denver* case and in every area of the North, de facto segregation that masquerades as de facto, but the courts will probably find that it is de jure, but more sophisticated than the southern type.

Senator **Ervin**. I would agree with you if I were able to accept the concept that Americans should be entitled to freedom provided that they exercise their freedom in a manner pleasing to government. However, to be denied freedom whenever it is exercised in a manner displeasing to government means that there is no freedom.

Mr. **Horn**. Mr. Chairman, freedom is interesting. We are all for it, and I am for it, but I recall one of my distinguished predecessors on my Commission, Erwin N. Griswold, later Solicitor General of the United States, who, at a hearing the Commission held in Mississippi, noted that there was great "freedom" for any black citizen to walk into the local county courthouse and register to vote, provided you could "interpret" some of the most complex provisions of the Mississippi constitution. I can recall that in one Commission hearing, Dean Griswold went to the voting registrar that was asking a black citizen those questions and said, "You interpret this provision," and the registrar could not do it. That kind of freedom is not really freedom.

Senator **Ervin**. You are going out on a tangent on something else.

Mr. **Horn**. It is the same principle.

Senator **Ervin**. You can certainly enforce freedom. There are plenty of laws on the books.

Let us go back to this question of jurisdiction. Congress passed an act that deprived all the Federal courts of jurisdiction which they had exercised since the foundation of this country, to issue injunctions in labor controversies, and the Supreme Court of the United States upheld that denial of jurisdiction in many cases.

Mr. HORN. I do not think, one, you were talking about a constitutional right, were you, Mr. Chairman?

Senator ERVIN. Why does a man not have a constitutional right to go into court to get an injunction to protect his property and contract rights?

Liberty includes a contract right, and property includes property right, which is guaranteed by the due process clause.

Mr. HORN. As I indicated, in every case where the Court has had a concern that it might be edging toward a deprivation of a constitutional right, there has been protective language in the Court decision. I cited the one on the portal-to-portal pay, and of course, you take the Norris-La Guardia Act, if you can believe Representative Thompson and Professor Pollitt, Congress declared that unless certain enumerated conditions existed, no court in the United States shall have jurisdiction to issue a temporary or permanent injunction in any case growing out of a labor dispute, which you cited. The Supreme Court said there could be no question because it was the power of Congress to define and limit the jurisdiction.

However, the point these authors would make is that the Supreme Court is not so casual of the denial of Federal jurisdiction when it also constitutes a denial of substantive constitutional rights. That is the point I have been trying to make in this discussion.

Senator ERVIN. I think when they hold as they did in the *Egness* case that when a man could not even set up a defense in a criminal action, he had been denied due process of law, and I think that is the complete answer to that question.

If you have further observations——

Mr. HORN. May I have your permission to introduce this Thompson-Pollitt article, the article?

Senator ERVIN. Yes. We will be glad to have it.

[The information referred to follows:]

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THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES,
Washington, D.C., February 19, 1974.

Hon. SAM J. ERVIN,
Chairman, Subcommittee on Constitutional Rights, Committee on Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR ERVIN: The League's opposition to so called "freedom of choice" school proposals is well known to you and the members of your subcommittee. Nevertheless, we must once again register our vigorous dissent to S. 1737 et. al. on which you are holding hearings this week.

In effect, S 1737 repeals titles IV and VI of the 1964 Civil Rights Act by requiring courts and agencies to accept "freedom of choice" and prohibiting the courts and the Departments of HEW and Justice from applying current constitutional standards.

League members are committed to providing every child equal opportunity for a quality education. To us, integration goes hand in hand with quality, and we are appalled that Congress should devote time and energy to repeated attacks on one method of achieving integration. A more important issue which should be claiming your attention is to insure that every student does indeed have access to a quality education.

We therefore respectfully request that this letter registering the League's opposition to S 1737 be made part of the official hearing record. In addition, I submit for the record also a copy of my statement of March 2, 1972 before House Judiciary Subcommittee No. 5 in opposition to similar anti-busing proposals. Though the March 2 statement speaks to proposed constitutional amendments, the reasons given for League opposition apply whether a proposal is statutory or constitutional.

Sincerely,

LUCY WILSON BENSON, *President.*

Enclosure.

STATEMENT ON H.J. RES. 620 AND OTHER ANTI-DESEGREGATION AMENDMENTS BEFORE HOUSE JUDICIARY SUBCOMMITTEE NO. 5 BY LUCY WILSON BENSON, PRESIDENT, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, MARCH 2, 1972

I am Lucy Wilson Benson, President of the League of Women Voters of the United States, an organization with members in over 1,300 communities in all 50 States, and I appreciate the opportunity to appear before you today in their behalf. I speak in opposition to all proposed constitutional amendments which either would prohibit outright the use of busing as a tool for school desegregation or would in other ways effectively limit the various means to achieve the goal we seek: integrated, quality education for all children.

The League's commitment to equal educational opportunity runs deep. Our principles state explicitly: "The League of Women Voters believes that . . . every citizen should . . . have access to free public education which provides equal opportunity for all . . ." From these principles stems our position in favor of integrated, quality education. And we affirm that integration is an integral part of educational excellence. Furthermore, we support any reasonable method for reaching this goal.

Leagues do more than examine issues and take positions. They are working hard and effectively, in all parts of the country, with every tool available to citizens, to bring this desegregated, quality education into being.

For example, in the metropolitan areas of Boston, Massachusetts and Hartford, Connecticut, local Leagues have supported METCO and PROJECT CONCERN, programs to transport children from the inner city to suburban schools, to correct racial imbalance and improve the children's educational opportunity. In California, Florida, New York and Pennsylvania, state Leagues have urged their states to play more constructive roles in providing solutions to school segregation and to show more leadership to local communities.

Grassroots operations of our local Leagues have a tremendous impact on their respective communities. League members of Charlotte-Mecklenburg are not militants; nevertheless, they were vehement in their fight to see that their own and other children received better quality education.

The League of Charlotte-Mecklenburg was not alone in its efforts. The entire League has, after intensive study and evaluation, committed itself to pursue actively those means which would guarantee quality education. With this common obligation in mind, the League of Charlotte-Mecklenburg, the LWVUS, and the LWV of North Carolina joined the *James E. Swann* v. *Charlotte-Mecklenburg* case as *amici* in June 1970.

Their decision to submit *amicus curiae* briefs in this case came only after the Charlotte school board's failure to draw up desegregation plans in compliance with a court order of April 1969. League members of Charlotte sent a statement to the school board in May encouraging them to formulate a workable plan for desegregation. The school board still did not formulate a plan for the Charlotte area, so the judge secured outside help to do so. Two plans were eventually drawn up. The Court approved a plan involving two-way busing to be effective April 1, 1970, and the school board immediately appealed the decision.

In their efforts to curtail opposition to busing, League members talked to school board members, city and county officials, the Chamber of Commerce and the Superintendent of Schools. They also held open meetings daily during the summer of 1969 to keep citizens informed.

Guided by the belief that education must be improved in the Charlotte area, the League compiled yet another report in January 1970 in which they found "that segregated schools lead to cultural deprivation of all children." Furthermore they said that "it was not enough to have a good educational opportunity for a portion of our children. . . . Charlotte-Mecklenburg County [must] make excellence in education her prime goal."

League members saw themselves as an effective information center to help dispel fears harbored by parents in opposition to busing. They actively encouraged the positive responses of other organizations such as the Jaycees, the Ministerial Association and the PTA Council. League members also sponsored a candidates' meeting on educational television, and in numerous ways involved themselves in paving the way for orderly desegregation of their schools.

Prior to and after its decision to join as *amicus curiae* in the *Swann* case, the League stressed the positive aspect of bettering education for all children, with desegregation being only a part of the total program. Following the Supreme Court's ruling upholding the District Court decision for busing, the League issued a statement in support of public education saying that "the agonies of adjustment are behind us and now is the time for Charlotte-Mecklenburg to make excellence in education her goal."

At bottom, it is quality education for all that is the *real* national issue—not busing.

Excellence in public education is a widely shared American goal, and has been for a long time. What keeps growing and changing is our understanding of what it takes to provide it—*for everyone*. We keep learning *which* past customs have been depriving children of a good education—and depriving the nation of the fruits of that education.

The nation has just been through an 18-year learning process to grasp a single fact: Separate *can't* be equal. And the League of Women Voters stands firmly with the arguments set forth by the Court in *Brown v. the Board of Education.*

Our courts have continually reiterated the *Brown* decision of 1954 in which it was declared that separate school systems are inherently unequal. This decision was of historic significance in that it declared illegal a nationwide attempt to segregate black and white public school children because of race.

It knocked down the notion that segregation by race in public schools was desirable or even beneficial to black or white youth.

Its application meant that each child should have equal access to the education resources of the school system in which he resided, regardless of his racial or socioeconomic background.

In giving life to the Fourteenth Amendment as it pertains to school desegregation, the *Brown* decision reinforced Thomas Wolfe's statement that the right "to become whatever [one's ability] and vision can combine to make . . . is the promise of America."

But the courts have continually had to reaffirm the original principle spelled out in *Brown*. They have also had to deal with sophisticated and invidious artificial barriers to school desegregation—gerrymandered school attendance zones, discriminatory zoning practices in housing, tracking and ability grouping of students, and assignments of faculty and staff on a racial basis.

In *Brown II* (1955) the Court addressed itself to the question of implementing the principles outlined in *Brown I*. Essentially the Court said that school systems should work out local problems created by deeply entrenched dual school systems with "all deliberate speed."

Thirteen years later in *Green* v. *County School Board of New Kent County, Va.* the Supreme Court ruled that the "freedom of choice" method of desegregation was no true freedom. The Court ordered the school board to devise a plan that would promise to convert promptly to a system without a "white" school and a "negro" (sic) school. *Green* added another important ingredient in that the Court not only sought a desegregation plan that would work, but one that would work without further delay. Another lesson in Americanism learned.

In *Alexander* v. *Holmes County Board of Education* (1969) the Court ruled that it was the "obligation of every school district . . . to terminate dual school systems at once and operate now and hereafter only unitary schools." One more lesson.

Recent court cases—and one decision—are now challenging the property tax as the base for public school support. Plainly, a basic injustice has surfaced to worry the public conscience: as long as schools are mainly financed by property taxes, poor neighborhoods (minority and white) will generally have worse schools than wealthy neighborhoods. For years we thought that was just the way it had to be. Now we don't. Still another lesson—though not all the homework is done.

Let us return now to the historic *Swann* decision. *Swann* challenged the nation to go beyond a narrow position of self-interest in considering, once and for all, whether we really want quality education for *all* our children.

The 1971 *Swann* decision went further than any other previous decision in laying out instructions for dealing with the realities of implementation. Speaking to the issue of attendance zones and the issue of residence and "neighborhood schools" the Court said: "All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The awkwardness of the remedy cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems." The Court spoke directly to the issue which ostensibly provoked these hearings: busing. In its unanimous decision, the Court found "no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of desegregation."

This lesson, it appears, some would have us unlearn.

Since 1954, the Court has been our chief teacher—a classic role. It has consistently maintained that dual but separate schools are inherently unequal. The principle of equal access to quality education for all children stems from that initial decision, refined by later decisions about mechanisms. Clearly the court decisions have not been capricious in nature; they have declared unalterably and without doubt that not only must children be afforded every means to obtain equal educational opportunities, but that blocking this effort is illegal.

We find it sad to be here today recapitulating the Court history. Yet, the need to do so points up one very obvious fact. Those who want to see the law on school desegregation upheld have consistently had to go the courts, even though administrative enforcement powers exist under Title VI of the Civil Rights Act of 1964 and have proven to be effective when exercised.

But the Administration, federal agencies and legislators have been reluctant to use these enforcement powers and to set forth positive legislation which transcends partisan politics and parochial emotionalism. As a result, the decisions made by the Supreme Court and District Courts stand as the most binding national policy this Nation has regarding school integration. And it is to the courts we have had to turn for reason and guidance. The League affirms the *Swann* decision in maintaining that busing is a tool that must be held available to remedy serious inequities in education. We hold, with *Swann*, that it is a *permissible*, though not a required tool, in dismantling a dual educational system.

Perhaps it is not the best tool. It certainly is not the only tool—and emphatically, it is not a new tool.

The proposed amendments appear to speak to the desires of many parents, both white and black, who argue that busing destroys the right to neighborhood schools and denies freedom of choice. Admittedly, there are arguments in favor of neighborhood schools. Children can easily participate in after-school activities. Parents can readily attend PTA. Inclement weather becomes less of a problem. The position of the school as an integral part of the community is established. Parents feel more comfortable, less fearful, knowing their children are in a school close to home.

Yet at the same time we all know that busing has been the tool of choice for many years, to get rural children *out of their neighborhoods* with their one-room schools and into consolidated schools where, presumably, they could have better facilities, a more varied program, better qualified teachers, and a less isolated school experience. Even now in suburbia, the high school where no bus pulls up to the door is a rarity. From personal experience, I might add, as a secondgrader in Dallas, Texas, I was bused clear across town and no one was disturbed about whether or not this was too much for me to endure. Furthermore, neither my parents nor I had any say whatsoever about the decision. So busing can't be all bad.

Total miles traveled have not increased as a *result of desegregation*, even though, as is to be expected, the number of children traveling has grown both as a result of a larger school population and greater consolidation of school districts.

In the 1960–61 school year 13,106,779 public school children out of a total public school population of 36,281,000 rode a total of 1½ billion miles on buses. Some 186,000 vehicles were used at a total public expense of $505,754,515. Ten years later, in the 1970–71 school year, some 19,617,600 public school children out of a total public school population of 45,905,000 rode a total of 2.2 billion miles. Some 256,000 vehicles were used at a total public expense of $990,000,000.* Last year the national picture showed 40% of our public school children—65% when you include those using public transportation—rode to school each day for *reasons that have nothing to do with* school desegregation.

We can only conclude that the neighborhood school, though desirable as an aid to quality education, is not a precondition for it. Nor do we discover much of a history of freedom-of-choice attendance on the American public education scene.

And in all this we have not yet mentioned the long years that black children, North as well as South, were bused past one public school to a more distant and often inferior one. Where were the outcries then, the constitutional amendments, the tender sensibilities about neighborhood schools and parental rights and freedom of choice?

The members of the League of Women Voters are deeply concerned over the hysteria developing around the question of busing school children. Studied reason appears to have been lost to the pressure of emotional reaction sweeping the country. Both the Administration and Congress have responded to this hysteria with an equivalent emotion rather than with the responsible leadership one would hope for in view of the desperate need to heal the divisions among Americans rather than to exacerbate them. Parents' fears are real that their children will receive an inferior education or suffer violence at the end of the bus line. The level heads among us share a responsibility for calming those fears by encouraging every citizen to play a role in his community to carry out our constitutional goals.

There is so much that can be done to reduce these fears, and many school districts have handled it very well. If two-way busing requires temporary use of an older building, there is no reason for the quality of the curriculum or the teaching to be inferior if the local school board insists upon uniformly high standards. The problem of confrontation and violence also can be reduced to a low minimum if there is careful preparation, good leadership, and good will in the community. And let us remind ourselves that there is virtually no problem of racial violence among young school children. The deep-seated anxieties of many Americans concerning busing and racial integration can best be reduced by a new dedication to quality education and not by setting the clock back.

And setting the clock back is exactly what these constitutional amendments do. They aren't just about busing. Some—require courts and agencies to accept "freedom of choice" which was rejected by the Supreme Court and Title VI of the 1964 Civil Rights Act. These amendments would effectively repeal Title VI. Other amendments attempt to preserve the "neighborhood school" principle, thereby legalizing segregation (and dual school systems) which occurs as a result of residence patterns. Others prohibit requiring transportation to achieve integration or the use of public funds for this purpose. These amendments, as they apply to federal agencies, would effectively repeal Title IV and Title VI of the Civil Rights Act by prohibiting the Departments of HEW and Justice from applying current constitutional standards.

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*Figures obtained from Vance Grant, HEW, and David Soule, Pupil Transportation, Department of Transportation.

The League contends that the proposed constitutional amendments offer only a nonsolution to a very real educational problem: that we as a Nation have failed to provide quality education to all children regardless of residence, race, class, creed, sex, or national origin. Nor do the Green, Broomfield and Ashbrook amendments attached to the House-passed Higher Education and Quality Integration Act address themselves to the problems of providing quality education or equal access to it. These are called anti-busing amendments but in reality they are anti-civil-rights amendments. Not only do they not address the problem; they propose to roadblock possible attempts to solve it.

A closer look at H.J. Res. 620 makes this readily apparent. This proposal, couched in pseudo-civil-rights rhetoric, provides that no public school student shall, because of his race, creed or color, be assigned to or required to attend a particular school. This proposal runs directly counter to the whole thrust of law developing since 1954. Especially it is contrary to *Green* in that it seeks to resurrect a false freedom of choice that perpetuates old wrongs that spring from segregated residential patterns. For it is *not* enough to create a unitary school system in which no person is to be effectively excluded from any school because of his race or color.

Besides opposing H.J. Res. 620 for its substance and intent, we oppose it and others like it because we share the alarm of leaders like Governor Reubin Askew of Florida, who warns: "It is very dangerous under emotional circumstances to tamper with the U.S. Constitution."

The members of this Committee do not have to be given a lesson in constitutional theory. We all know that a constitution is designed as a statement of broad principles omitting details, especially those born of particular controversies. The U.S. Constitution has worked well for nearly 200 years with few alterations because it does *not* contain provisions which become outdated.

To be sure, busing as a means to *correct* racial imbalance is late to the scene. But in evaluating its use, it is well to remember that as more years go by without effective school desegregation, the need for shortcuts increases. What might have satisfied in 1955 cannot satisfy now. The accent has had to shift from deliberate to immediate speed, particularly in those places where an entire generation has been born and has finished high school with pretty much the same segregated and inferior schooling that was imposed on their elders.

Besides which, over the years our perceptions grow keener, not dimmer, in these matters. We discern the interior and the subtly segregationist and racist where we may not have perceived it fifteen or even ten years ago.

Residential integration would, of course, obviate this kind of busing. But a whole generation or more cannot wait. The six-year-old child starting first grade in a poor neighborhood, a minority neighborhood, has only that one year to be in first grade, only one childhood in which to claim his birthright to a good public education. While the struggle to open the gates of suburbia with its invisible but sturdy walls of class and race exclusivism goes on, today's poor children must go to good schools. Busing offers one immediate access to better education.

Unpopular though busing may be, it is the only alternative within the means of some communities to achieve a measure of integration for this generation. The question is: Will we become mired in the busing issue or do we turn our energies toward raising the level of public education offered to every child in America?

Leadership must be exercised by our elected public officials to guide the present discussion along rational lines. To act favorably on H.J. Res. 620 or similar amendments could only imply withdrawal of congressional support, under emotional pressure, for efforts undertaken already to integrate our schools. The League of Women Voters therefore urges the members of this Committee and of the entire Congress not to be party to such a disaster.

Mr. MITCHELL. Mr. Chairman and members of the subcommittee as I have said, I am Clarence Mitchell. I appear to voice our organization's opposition to S. 179, S. 287, S. 619, and S. 1737. I got here as Senator Helms was testifying, and I am not certain that I had seen his bill because I did not hear the number of it, but I did hear him say that under the terms of his bill the courts would be deprived of jurisdiction after the lapse of a year from the date of their decisions. If that is so, I would say certainly it would be an unfortunate development in American law, and I would therefore feel that his bill, if I have correctly quoted him, would be unacceptable and one that we would also oppose.

The staff member has just given me a copy of it, and I assume that what I have said about it is correct.

Although they use different approaches, and now this would also include S. 2336, all of these bills have two things in common. Each of them would undermine or nullify U.S. Supreme Court decisions ranging in time from *Brown* v. *Board of Education*, 347, U.S. 483 (1954), 349 U.S. 294 (1955) to *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). Each of them seeks to reimpose upon the schoolchildren of the United States the unconstitutional handicap of separate and unequal education based on race.

Twenty years ago the U.S. Supreme Court struck down racial segregation in the public schools. From that day to the present those who want to maintain a dual system of education based on race have sought to destroy that decision with stratagems, economic pressure, and even violence. New recruits from above the Mason-Dixon Line have joined in the fray as votes on so-called busing amendments will show.

From the beginning of the prosegregationist effort to nullify the *Brown* decision the contest has been unequal. Those who supported the decision had limited funds, slender resources and few forums in which to state their views. Those who opposed the decision controlled the political and economic power in the areas of resistance. They could and did fire hundreds from jobs as reprisals, they could and did use their State, county, and local treasuries to raise delaying questions in courts.

At this point, Mr. Chairman, with your permission, just to back up what I have said with respect to that, I would like to offer for the record a portion of the opinion in the *Green* case. It is a footnote in which the Court points out the instances in which people who tried to go to schools that were supposed to be open to all without regard to race were denied the opportunity by various kinds of intimidation, economic reprisals and so forth. I am offering pages 1695, 1696 from 88 Supreme Court Reporter. The court points out that among other things, fear, retaliation, and hostility from the white community continues to deter many Negro families from choosing formerly all white schools.

With your permission, Mr. Chairman, I would like to insert that footnote.

Senator ERVIN. It will be received in evidence and printed as part of the record.

[The information referred to follows·].

[Footnote from pp. 1695, 1696, 88 *Supreme Court Reporter*]

[5] The views of the United States Commission on Civil Rights, which we neither adopt nor refuse to adopt, are as follows:

"Freedom of choice plans, which have tended to perpetuate racially identifiable schools in the Southern and border States, require affirmative action by both Negro and white parents and pupils before such disestablishment can be achieved. There are a number of factors which have prevented such affirmative action by substantial numbers of parents and pupils of both races:

"(a) Fear of retaliation and hostility from the white community continue to deter many Negro families from choosing formerly all-white schools;

"(b) During the past school year [1966–1967], as in the previous year, in some areas of the South, Negro families with children attending previously all-white schools under free choice plans were targets of violence, threats of violence

> and economic reprisal by white persons and Negro children were subjected to harassment by white classmates notwithstanding conscientious efforts by many teachers and principals to prevent such misconduct;
>
> "(c) During the past school year, in some areas of the South public officials improperly influenced Negro families to keep their children in Negro schools and excluded Negro children attending formerly all-white schools from official functions;
>
> "(d) Poverty deters many Negro families in the South from choosing formerly all-white schools. Some Negro parents are embarrassed to permit their children to attend such schools without suitable clothing. In some districts special fees are assessed for courses which are available only in the white schools;
>
> "(e) Improvements in facilities and equipment * * * have been instituted in all-Negro schools in some school districts in a manner that tends to discourage Negroes from selecting white schools."
>
> Southern School Desegregation, 1966–1967, at 88 (1967). See id., at 45–69; Survey of School Desegregation in the Southern and Border States 1965–1966, at 30–44, 51–52) U.S. Comm'n on Civil Rights 1966).

Mr. MITCHELL. The persons who were opposed to desegregation could and did use the U.S. House of Representatives and the U.S. Senate as forums in which to proclaim manifestos, doctrines of nullification, proposals for interposition and proposed revisions of the U.S. Constitution itself. Moreover, they were aided by the agencies of the executive branch of the Government of the United States.

This quotation from *Swann* describes an all too familiar pattern of the Federal power being used to support segregation in the public schools:

> Residential patterns in the city (Charlotte, N.C.) and county (Mecklenburg) resulted in part from Federal, state and local government action other than School Board decisions. School Board action based on these patterns, for example by locating schools in Negro residential areas and fixing the size of schools to accommodate the needs of immediate neighborhoods, resulted in segregated education.

I was in the city of Charlotte shortly after the Supreme Court handed down the 1954 decision. One of my friends who I believe is known to the Chairman, Mr. Kelly Alexander, and I were talking about how the Court, even though it had rendered a favorable decision, would be frustrated by the action of the power structure in the city of Charlotte, N.C. He pointed out to me physically the way in which the schools would be located so that by the simple device of saying, you go to the school nearest your home, automatically you would go to a segregated school.

In the *Charlotte-Mecklenburg* case, of course, what he said was substantiated by the finding of the U.S. district court and thereafter incorporated into the record by the Supreme Court of the United States.

As we have said, the bills now under consideration by this subcommittee seek to undermine Supreme Court decisions. They would also cancel out the legislative backing given to desegregation of the public schools under titles IV and VI of the 1964 Civil Rights Act and safeguards protecting educators against discrimination provided by 1972 amendments to the Equal Employment Opportunity Act.

In *Brown II* (1955) the Supreme Court described remedies that could be used to implement *Brown I* (1954). The following is the exact language of the Court:

> In the fashioning and effectuating of decrees, the courts will be guided by equitable principles. * * * The courts may consider problems related to administration, arising from the physical condition of the school plant, the school trans-

> portation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the Defendants may propose to meet these problems and to effectuate transition to a racially non-discriminatory school system.

Title VI of the 1964 Civil Rights Act prohibits "exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on grounds of race, color, or national origin." Under this title, Federal agencies have the power to withhold funds from school systems that discriminate on the basis of race.

S. 1737 makes a systematic attempt to knock out the cited portion of *Brown II* and also to destroy the safeguards against spending Federal funds to support segregation as provided by title VI.

S. 1737 would enact a new title XII to the Civil Rights Act of 1964. It would be called Public School—Freedom of Choice.

Section 1202 would forbid any "department, agency, officer, or employee of the United States" to withhold funds from school boards, public schools or class operating under a so-called freedom of choice system.

Section 1203 would prevent withholding of funds from public schools as an inducement to transport students "for the purpose of altering in any way the racial composition of the student body" of a public school operating under the freedom of choice plan. Here is a phrase that puzzles me greatly because the whole thrust of the bill is directed at schools operating under freedom of choice plans. The phrase is "or any other public school." So, in effect, the bill would not only prevent those operating under the so-called freedom of choice plans from carrying out the requirements of law, but others who are not operating under such plans would also bear the burden of what this statute proposes.

Senator ERVIN. That section you just read, I will review that very carefully, but I think it is in perfect harmony with freedom of choice because this bill is based on the theory that freedom of choice is in perfect harmony with the equal protection clause, and as to restrict the Federal Government's action where freedom of choice is established.

Mr. MITCHELL. What I was referring to, of course, are lines 22 and 23 on page 3. As you know, the whole foregoing part of the section deals with schools operating under freedom of choice plans, but then you have a catchall that says, "or any other public schools."

Senator ERVIN. When you read this whole bill, that establishes freedom of choice, you see, what you have is freedom of choice. This is directed only to freedom of choice. It puts no limitation whatever on any action of the Federal Government unless it is a freedom of choice system that exists.

Mr. MITCHELL. I do not pretend to be an authority on statutory construction, but I would say if I were asked to construe this, if I were sitting as a judge, I would look at the whole purpose of the bill to find out what the intent is of those who offered it, but the thing that would prevent me from the feeling that this bill was confined to freedom of choice schools is the fact that on its face the bill says "or any other school" and the question would arise, why, if it were limited to freedom of choice schools, why would that phrase be in there?

Senator ERVIN. What this means is that you cannot withhold funds from a particular school to induce it to transport children or to induce the transportation of children to any other school. It's all related, I think, to the freedom of choice.

Mr. MITCHELL. I would agree, Mr. Chairman, if it were not the plain meaning of the English language that this bill undertakes by the words it uses to include schools other than those which are operating under freedom of choice plans.

It may be that this is surplusage, but the English language is irrevocable in this case. It says "other schools."

Senator ERVIN. I thank you. You are a pretty good lawyer if you can interpret it that way. I will comment to you by saying that it is certainly intended where the school board operating such other schools maintains with respect to such schools a freedom of choice system. I recognize that the equal protection clause prohibits discrimination, but it does not empower the Federal Government to deny people freedom.

What I am trying to do is to reconcile the proper interpretation of the equal protection clause with freedom.

Mr. MITCHELL. I would certainly honor your intentions, Mr. Chairman. That is why I thought it would be wise to call that particular wording to your attention, because it is out of keeping with your normal careful practice of saying what you mean.

Senator ERVIN. I appreciate it. When I was a judge I read so many judicial opinions I could not understand. I tried to write them so people could understand them. That's why I write my own bills instead of having the legislative counsel write them.

I appreciate you calling my attention to that.

Mr. MITCHELL. Section 1204 would prevent the withholding of funds "to coerce or induce" any school board operating such a freedom of choice public school system to close any public school, and transfer the students from it to another public school for the purpose of altering in any way the racial composition of the student body at any public school.

There again we have wording which in my judgment would be broader than a mere freedom of choice because it would include schools which are not necessarily operating under the freedom of choice program.

Section 1205 would prevent funds from being withheld as an inducement to affect desegregation of faculties in public schools.

Section 1206 would open the door for a flood of suits against the United States to force the release of funds that are withheld for the purpose of seeing that Federal moneys are spent on a nondiscriminatory basis.

Using the disguise of freedom of choice, S. 1737 prohibits the withholding or threat to withhold funds in order to promote desegregation by: First, transportation of students, which of course has been ratified as an acceptable way in the *Swann* decision; closing of schools and transfer of students, which is a procedure that has been upheld by other cases; and it would prohibit the transfer of faculty. I call your attention, Mr. Chairman, that in the case of *Davis* v. *the Board of School Commissioners of Mobile County, Ala.*, which was decided I believe on the same day as *Charlotte-Mecklenberg*, the Court said, that in order to accomplish the objectives of desegregation, a way had to be found to integrate the faculties, and as I have said before, when we were considering the 1972 amendment to the Equal Employment Opportunity Act, there were specific provisions added which would cover the question of fair and equal employment of teachers.

In keeping with your traditional position, Mr. Chairman, you offered an amendment to strike that out, but it was not accepted. It is the law that people cannot be discriminated against because of race in the faculties of educational institutions that are within the reach of the statute.

Senator Ervin. You do not agree with my purpose, but I think when a teacher contracts, when a lot of teachers contract to go and to teach in school, they are located there, and you have a Federal judge giving an order that they have to go to school C. They were never contracted to teach there. I think teachers ought to have some freedom of choice, anywhere they are going to teach. I just do not believe that all people should be converted as puppets to move around to the whim and caprice of Federal judges, or the bureaucrats in HEW.

Mr. Mitchell. I would have a more general interpretation of that. I would say the institutions, I believe, should offer good pay are police and fire departments and school teaching. They are so important in our system.

Senator Ervin. That is something you and I can agree on, absolutely.

Mr. Mitchell. I also believe that when people are parts of those community institutions, they have to subordinate their personal wishes and desires to the needs of the system. Thus, it would seem that a teacher who says that I will teach, just as the policeman who says, I will enforce the law or a fireman who says I will put out fires, does not have the right after making such an agreement to be selective and say, I will not go to that place merely because I do not like it.

I think the persons who make the assignments have a duty and a right to try as well as they can not to do anything that is obnoxious, but once a decision is made that the needs of the educational system require a teacher to be in a certain place, I think a teacher has a duty to go or resign.

Senator Ervin. You take my county where the schools are under one countywide school board. Many teachers would be glad to teach near their home in Hildebrand, and to say that a judge ought to be allowed to move one from Hildebrand which is 18 miles east of the county seat to a point 28 miles, up to Jonas Ridge to teach, I think is a great injury to education as well as a great injustice to the teacher. It keeps a lot of good and competent teachers from going into teaching.

Mr. Mitchell. I do not think you can answer that question one way or the other until you have read the terms of the contract. If it is like most contracts, I would assume that there would be a provision in it that would give to the appointing authority some right to designate the place where the teacher could best serve, and if that is set forth in the contract, as I believe it would be——

Senator Ervin. Not all contracts are drawn like that. The strange thing, we have so much in that bill that can hardly be reconciled with the spirit of the Constitution, as I pointed out. Here is an equal protection clause designed to prevent tyranny by the State used as an instrument to perpetrate tyranny by the Federal Government. Here the U.S. Congress says, no State can pass any law impairing the obligation of the contract, but here it says the Federal Government can impair the obligation of contracts.

Mr. Mitchell. You would have to look at the contract to see if it in fact were impaired by the transfer before you could decide that the contract had been violated. I would say, not being an authority on education, if I were asked to prepare a contract which would be offered to teachers to sign, I would retain in it the right for the appointing authority to assign the teacher to the place where that teacher would serve the educational needs at that particular time.

Senator Ervin. As long as I am not destitute and not denied welfare on that ground, I would not sign any contract to teach if it gave the school authorities authority to shift me someplace I did not want to go.

Mr. Mitchell. That would be your right, but if you signed it, it would seem to me you could not thereafter argue that it was an invasion of the contract right to transfer.

Senator Ervin. I am objecting. I am trying to take the power from the Federal Government, where there is a freedom of choice system, to abandon contracts.

Mr. Mitchell. I do not think this present system does that. I would like to see the contract you are talking about. I would predict that if such a party had a valid claim that the contract was altered, the party raising that claim would prevail, which is as it should be, of course, but I would doubt very much that such contract rights have been invaded by what is being done now.

Each and every one of these forms of effecting desegregation has been approved by the Supreme Court, where the circumstances warrant their use. The bill would place government agencies and personnel in a threefold dilemma. First, it seeks to force them to ignore the law of the land, as interpreted by the Supreme Court. Second, in some instances, it would require them to ignore court orders directed to them, such as that in *Adams* v. *Richardson*, and place them in danger of contempt of court.

I have brought with me, Mr. Chairman, a court order in *Adams* v. *Richardson*. On page 5 of that order there is an explicit instruction to the persons in HEW who carry out the requirements of Title VI, the 1964 Civil Rights law. With your permission I would like to insert that page in the record to support what I have said.

Senator Ervin. Can you designate the page?

Mr. Mitchell. Page 5.

Senator Ervin. Page 5 of the opinion will be received as evidence and printed in the body of the record as such.

[The information referred to follows:]

[Filed, February 16, 1973, James F. Davey, Clerk]

United States District Court for the District of Columbia

Civil Action No. 3095–70

Kenneth Adams et al., plaintiffs,

v.

Elliot L. Richardson, Individually, and as Secretary of the Department of Health, Education and Welfare et al., defendants

* * * * * * *

(5) The time permitted by Title VI for securing voluntary compliance for these districts before commencing enforcement proceedings has long since passed.

The continuation of HEW financial assistance to these noncomplying school districts violates the rights of plaintiffs and others similarly situated protected by Title VI of the Civil Rights Act of 1964. Having once determined that a school district is in violation of Title VI, and having failed during a substantial period of time to achieve voluntary compliance, defendants have a duty to commence enforcement proceedings.

B. Injunction

(1) Defendants, their successors, agents and employees, are required and enjoined within 60 days of the date of this Order to commence enforcement proceedings by administrative notice of hearing or to utilize any other means authorized by law, in order to effect compliance with Title VI by each of the school districts HEW found to be out of compliance with Title VI during the 1970–71 school year, unless defendants thereafter and prior to this Court's November 16, 1972 Memorandum Opinion have made an administrative determination of compliance by the school district.

(2) Defendants, their successors, agents and employees, are required and enjoined to provide in verified form the following data to counsel for the plaintiffs on the dates indicated: a. Within 150 days of the date of this Order, a report of all steps they have taken to comply with the injunctive provision set forth in the preceding paragraph, including a description of what action the Justice Department has taken concerning any school district defendants may have referred to the Department. b. Every sixth month after the issuance of this Order for a period of three years, so as to permit evaluation of the reasons for any delays by defendants in bringing enforcement proceedings:

* * * * * * *

Mr. MITCHELL. Third, S. 1737 seeks to force employees to violate the oath of office that government officials take under article VI of the Constitution to support the Constitution. For, if they do what this bill would direct them to do, they would be in violation of that oath.

Senator ERVIN. If Section 1206 became law, it would be the law of the land.

Mr. MITCHELL. It would be the law of the land, but——

Senator ERVIN. Taking an oath to obey the law of the land would not be unconstitutional.

Mr. MITCHELL. It is black letter law that when the legislative body passes a statute [illegible] is not final law until it has been reviewed by a court of appropriate jurisdiction. So I would say, I would say this provision, if it became law, would be the law that people should obey until such time that it would be successfully challenged in court, and I predict it would be successfully challenged.

Senator ERVIN. My reply to that would be, if a court would ever hold unconstitutional a law that is so perfectly in compliance with the equal protection clause of the Constitution as my bill, that court ought to go out of business, or go back to law school and study some elementary principles of law.

Mr. MITCHELL. I would say the law schools have profited from some recent visitors they have had. I recall seeing a story about you up at the Yale Law School and the students enjoyed your visit very much.

Who knows? Maybe one of those will someday sit on the Supreme Court and have to pass judgment on this or a similar statute.

As I have said, this section 1207 would bar courts of the United States from having jurisdiction "to make any decisions, enter any judgment or issue any order requiring any school board to make change in the racial composition of the student body at any public school or in any class at any public school to which students are assigned in conformity with a freedom of choice system. * * *" It would also prevent transportation of students, give parents the right to refuse to send their children to a given school, prevent transfer of children from closed schools and the transfer of faculty members if such actions would conflict with freedom of choice plans.

The long record of court cases involving freedom of choice plans shows that the mere use of the words does not insure that a school system which was formerly segregated on the basis of race will become a unitary system. At present the burden of proof is on those who discriminate. S. 1737 would effectively shift the burden to the victims of discrimination. S. 1737 would also effectively deprive the courts of power to give remedies in cases where the definition of freedom of choice under section 1201(g) of S. 1737 has been met. Under the definition of freedom of choice in S. 1737, results that give only token or lip service to desegregation would be permitted and the courts would be powerless to change them.

As has been said by other witnesses at this hearing, in *Green* v. *New Kent County*, the Supreme Court looked at that situation, even though it was a freedom-of-choice plan which I presume would satisfy the definition of this bill, but the Court found as a fact that the black students in some numbers, I believe approximating 100, had gone to the white school, but only one child had gone to the formerly all-black school, one white child. As Mr. Horn of the Civil Rights Commission said in his testimony prior to the time I came before you, it really amounted to a situation where you had buses almost running into each other taking black students to one end of the county and the white students to the other for the purpose of maintaining racial segregation under a so-called freedom-of-choice plan. There is some beautiful language in that decision by Judge Sobolov that I would like to read. The Supreme Court quoted him. He had made the statement in another case involving a Maryland county, but the Supreme Court quoted him and said,

> Freedom of choice is not a sacred talisman. It is only a means to a constitutionally required end, the abolition of a system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have a continuing duty to take whatever action may be necessary to create a unitary, nonracial system.

The Supreme Court cited that language with approval and held, of course, that under the circumstances of the *Green* case before it, the freedom of choice was meaningless.

Senator ERVIN. This would create a unitary system. No child under this bill could be excluded from a school because of its race.

Mr. MITCHELL. I would say respectfully that that may well be the intent of certainly the prime sponsor of the bill, but I would say on the basis of our sad experience it would not work that way.

Senator ERVIN. If you construe the law to say that the children have to be compelled to select schools that satisfy the whims of the Supreme Court Justices, it would not be that way. This would not give them real freedom.

Mr. MITCHELL. You would not say that children would be compelled. I would settle for Judge Sobolov's formulation that says, if the means prove to be effective and the only way you could determine whether the means are effective is to review the circumstances of the case before the court, and on the basis of those circumstances make a determination whether the method used has met the constitutional requirements.

Senator ERVIN. We had testimony here yesterday from the chairman of the school board of Charlotte-Mecklenburg who pointed out that under the decision of the courts, they had to determine, by lot, how many black children should be assigned to one school and determine, by lot, how many white children should be assigned to the school. I think that it has come to a sad day in the history of the United States when you have to resort to lot to find out where little children are going to get an education.

Mr. MITCHELL. This aleatory element of life is always present at all levels and unhappily has to be in the school system. If you have limited numbers of places——

Senator ERVIN. Most of the laws prohibit the Government from having the court decree.

Mr. MITCHELL. That is why I did not use the word gambling.

I would call to the chairman's attention the fact that the Charlotte school board had ample opportunity to present a constitutionally acceptable plan in its own right, and as a matter of fact, it was only as a last resort, after resistance by the Charlotte school board, that the court had to adopt a plan in which was an orderly system of desegregation.

Senator ERVIN. Which was devised in large part by an expert witness who had been hired by the plaintiffs to testify on their behalf.

Mr. MITCHELL. I suppose courts, when they have experts, give them credit for some honesty and assume that what the expert says is the prevailing authority in his field. Therefore, I would not attach any importance to the fact that the expert had been hired by one side or the other.

Senator ERVIN. I would hate to be sued by somebody and have the judge appoint somebody who was hired on the other side of the case and have that person perform some of the judge's duties and functions.

Mr. MITCHELL. I must say that happens in courts every day, as I am sure you know, in other forms of litigation.

Senator ERVIN. Not any court I presided over.

Mr. MITCHELL. Let's say you have an accident case in which a traffic expert who is employed by the State testifies for the prosecution. He certainly is in the service of the prosecution, and if the jury believes his testimony, it would certainly be helpful in reaching a decision.

On the other hand, even though he is employed by the State, it is presumed that he will be intellectually honest and say what the facts are, rather than what is a biased opinion. I am sure that is applicable here.

I would not be sure that this gentleman to whom you refer was paid by the plaintiffs, but whoever he was paid by, under the rules of evidence and under the procedures of courts that he was qualified as an expert, and as such he could be counted on to give an honest expert opinion that would be helpful to both sides in determining the issue before the court.

As S. 1737 seeks to utilize the freedom of choice concept to maintain the dual school system, S. 619 seeks to do the same by relying on the neighborhood school concept.

The bill would require that before a court or Federal department or agency orders student transportation as a remedy for school desegration, it must consider five other possible remedies, the neighborhood school, taking into account school capacities and natural physical barriers; the neighborhood school, taking into account only school capacities; transfer of students from schools in which members of their race are a majority to those in which they are a minority; rezoning school attendance zones; and other educationally sound and administratively feasible plans.

Senator ERVIN. I have to disagree with you with great reluctance. The record in the *Charlotte* case showed that the school board had come up with a plan that required mixing of the races of the schools as much as was possible to achieve under the zoning plans. Judge McMillan found, and everybody agreed, that the only way to desegregate the schools in northwest Charlotte was to bus thousands of children. So there was no other way to do it, on that record.

Mr. MITCHELL. The decision says that the facts submitted in this case graphically demonstrate that one of the principal tools employed by the school planners and the courts to break up the dual system has been a frank and sometimes drastic gerrymandering of school districts.

Senator ERVIN. They did drastic gerrymandering.

Mr. MITCHELL. Under that plan, there is a footnote, p. 1282, 91 Supreme Court Reporter, that says:

> * * * In Charlotte-Mecklenburg, the system as a whole witho[illegible]egard to desegregation plans, planned to bus approximately 23,000 students this year for an average daily round trip of 15 miles. More elementary schoolchildren than high schoolchildren were to be bused, and 4- and 5-year-old children would travel the longest routes under the system.

Thus, under the Charlotte system, which was devised as you have indicated, there was to be a great deal of busing, particularly involving the children of tender age. I would say the school board cannot be bad both ways.

Senator ERVIN. The judge did not let them have it any way. He required them to submit four or five different plans, each one more drastic than the other.

Mr. MITCHELL. That would not be supported by the language of the case as set forth in the record. I would say the record shows that there were orderly attempts to devise various plans, and after looking at all of them, the court made a decision which made it possible for students to attend on a desegregated basis.

But the key point, it seems to me, Mr. Chairman, is if the transportation of children is an evil, per se—and I am mindful of your analogy to the homicide situation—but I would say that if the transportation is an evil, per se, and if under the desire to give children the best opportunity to be educated we should keep them in what is described as neighborhood schools, how could you account for the fact that even without regard to desegregation, the school system was transporting 23,000 children 15 miles a day, and the 4- and 5-year-olds were going longer distances.

Senator ERVIN. The Charlotte-Mecklenburg County is a very large county. It covers a tremendous territory. It has a large rural population. A lot of the schools are consolidated schools, and you have to transport a lot of the children to get them to the school nearest to their home that is open to schoolchildren of their age and scholastic attainments. That is busing for educational purposes. Nobody objects to that, at least I don't

Mr. MITCHELL. The court agreed with you, of course, and said transportation was one way of getting children to places where they could get an education. Now, apparently what the authorities down there objected to was that it would be integrated education as well as good education.

Senator ERVIN. That is like using the number of homicides committed in self-defense as justifying homicides used to commit murder.

Mr. MITCHELL. I would say homicide is bad. There is a commandment, thou shalt not kill, and that is in your field of scriptural expertise. It seems to me that admonition of the commandment ought to apply to homicides that are murder as well as those in self-defense or in any other category. Murder is bad for religious as well as legal reasons.

Senator ERVIN. In other words, you are advocating not to kill in self-defense. That is just as bad if he murders another person.

Mr. MITCHELL. I would advocate prohibition against killing be accepted as one of the Ten Commandments—I do not think anyone could quarrel with that.

All of these remedies, as I have said, have been considered by the courts before student transportation was ordered in some cases as a last resort. The establishment of these criteria is, then, a meaningless gesture. The only purpose we see it serves is to harass those courts that have worked diligently to bring about effective desegregation and to provide an excuse for further delay for those that have tried to evade their responsibilities.

Under S. 619, where student transportation is allowed, it would be permitted only to the closest or next closest school. This obviously would shut off students of inner city schools from relief from segregation in many places.

We suggest that this, too, is but another attack on our judicial system. It seeks unconstitutionally to limit the right of the courts to grant litigants full relief, or to fully implement the equal protection clause of the 14th amendment. The courts have interpreted that provision of the Constitution, in some instances, to require the transportation of students to end the dual school system. This bill seeks to thwart these decisions by denying the relief that the courts have found the 14th amendment requires.

This bill also contains what we consider to be one of the most destructive legislative proposals advanced in the fight against desegregation. We refer to section 206, which would permit the reopening of any school desegregation law suit or plan approved under title VI of the Civil Rights Act of 1964. This would allow the reexamination of every court and agency decision on desegregation going back to the 1954 *Brown* decision, literally thousands of decisions and plans.

I can remember one of your stories, Mr. Chairman, in which you said a person has a right to cuss the court for a certain amount of time. This not only gives them the right to cuss the court, but it also gives him the right to reopen the case. It seems to me that is going a little bit too far because then you would have chaos in the judicial system, if you reopened what had been decided cases without any real reason.

By holding out a false hope of upsetting such desegregation as has been accomplished, this provision would create legal and community chaos and revive all the controversies, many of them bitter, that we had hoped were behind us. We do not think that in legal results it would accomplish anything except a mass of pointless litigation. In community terms it would only encourage a revival of activities by segregationist diehards.

Without going into all the details of the bill, we find many other provisions objectionable to those who believe in equality of opportunity.

Among the proposed legislative findings, we would point out three that are particularly disturbing. The first of these is that the dual school system has been effectively dismantled. This flies in the face of reality. In that connection, Mr. Chairman, I would like to offer for the record appendix B of the decision, an order by the court in *Adams v. Richardson* because there is set forth a whole list of areas which have not complied with the requirement to desegregate the schools. If we took those alone we would have a situation which would clearly refute the statement that the dual school system has been effectively dismantled.

May I offer that?

Senator ERVIN. That portion of the opinion will be received in evidence and printed in the record as such.

[The information referred to follows:]

APPENDIX B—SCHOOL DISTRICTS WITH SUBSTANTIAL RACIAL DISPROPORTION WHERE NO HEW "SWANN" LETTER SENT

Arkansas:
- Conway County
- Blytheville
- South Mississippi
- Hot Springs
- Texarkana

Florida:
- Madison County
- Martin County
- Hamilton County

Georgia:
- Hall County

Kentucky:
- Louisville
- Richmond City
- Floyd County
- Bowling Green City
- Hopkins County

Louisiana:
- Assumption Parish

Maryland:
- Baltimore City
- St. Marys County
- Worcester County

Mississippi:
- Greene County
- Vicksburg

Missouri:
- Kansas City
- St. Louis
- Maplewood-Richmond Heights
- University City
- Normandy
- Berkeley
- Webster Groves
- Rittenour
- New Madrid R-1
- Kirkwood R-7
- Columbia

Appendix B—School Districts With Substantial Racial Disproportion Where No HEW "Swann" Letter Sent—Continued

- North Carolina:
  - Washington County
  - Hickory City
  - Cherokee County
  - Asheville City
  - Kings Mountain City
  - Lumberton City
  - Hyde County
  - Johnston County
  - Cumberland County
- Oklahoma:
  - Pryor City
  - Anadarko
  - El Reno
  - Bartlesville
- South Carolina:
  - Harry County
  - Florence County #3
  - Laurens County #56
  - Lancaster County
  - Union County
  - Jasper County
  - Anderson County #5
- Tennessee:
  - Murfreesboro
  - Rutherford County
- Texas:
  - San Antonio ISD
  - Seguin ISD
  - Taylor ISD
  - Sweetwater ISD
  - Calhoun ISD
  - Lamar ISD
  - Snyder ISD
  - Plainview ISD
  - Kingsville ISD
  - Wilmer-Hutchins ISD
  - Brownfield ISD
  - McKinney ISD
  - Galveston ISD
  - Brownwood ISD
  - Levelland ISD
  - Fort Bend ISD
  - Northside ISD
  - Monahans-Wickett-Pyote ISD
  - Texarkana ISD
  - Jacksonville ISD
  - Hardin-Jefferson ISD
  - Mineral Wells ISD
- Virginia:
  - Westmoreland County
  - Martinsville City
  - Nelson County
  - Chesapeake City
  - Fluvanna County
- West Virginia:
  - McDowell County
  - Hancock County
  - Raleigh County
  - Cabell County
  - Kanawha County

Mr. Mitchell. Not only is it necessary to monitor many school districts under court or agency order to determine whether they are fulfilling their obligations under the orders, but discovery of segregation in previously undetected areas frequently occurs. A good example of that is the neighboring city of Baltimore which has a black school superintendent. I think they believed maybe they were trying to obey the requirements of the court, but it has been discovered that there, too, is a continuing system of racial segregation in public schools. This is especially so in the North, where many of the subtle practices in race relations made, what in fact is de jure segregation, appear de facto. Another of the findings we feel is erroneous is that declaring it against public policy to require racial balance. Although the Supreme Court in the *Swann* case found this not to be constitutionally required, it held that there was discretion in local school boards to establish a racial balance. We believe that discretion should be protected.

I might say that I think that was the intention of Congress because at the time when Congress was considering the question of racial balance in 1964, the question arose as to whether the Congress was trying to say to people that you could not seek racial balance if you wanted to try to undertake it. Senator Saltonstall, backed up by Senator Humphrey, made it very clear that it was their intention merely not to expand the powers of the court in this field, but simply to say that in the de facto situations the court should feel free to seek what would be equitable remedies. I have a brief discussion of the legislative history containing the citations from the Congressional Record on that, which I would appreciate an opportunity to offer for the record also, Mr. Chairman.

Senator Ervin. That will be received as evidence and made a part of the record.

[The information referred to follows:]

[Excerpt from "The Civil Rights Record of the Nixon Administration," 49 Notre Dame Lawyer 63 at 68–69 (October 1973)]

* * * * * * *

II. Desegregation of Public Schools

In addition to its early attempts to delay school desegregation in Mississippi the Nixon Administration must bear the major responsibiliy for creating a national issue on the subject of transportation. However, Congress must also share the blame After giving a nationwide telecast address on largely fictional descriptions of school busing problems, President Nixon sent a message to Congress on March 17, 1972, charging that transportation programs to accomplish compliance with court decisions on desegregation were widespread, costly, harmful to the educational process and created unnecessary administrative burdens. In contrast, Stephen Horn, then Vice Chairman of the Civil Rights Commission, testifying before the House Judiciary Committee on May 10, 1972, said that population growth accounted for almost all busing and that cost of busing had held steady at between 3 and 4 per cent of total educational expenditures for forty years. He also said that the Department of Health, Education and Welfare had advised Congress in 1970 that there had been more busing in past years to preserve segregated schools than in 1970 to desegregate schools.[11]

Although the present controversy over busing may seem to be a new development, it is really a continuation of a dispute that surfaced when Congress debated and passed the 1964 Civil Rights law. At that time, the southern opponents of school desegregation were fighting a rearguard action against implementation of the 1954 school desegregation decision. President Lyndon B. Johnson, who was then in the White House, the Department of Justice, and the majority of the members of both houses in Congress were united in their determination to implement Supreme Court decisions in school cases. Debate centered around Title IV of the then pending bill, H.R. 7152, which authorized the Attorney General to make the United States a party to civil actions seeking desegregation of public schools. In an effort to distinguish between what was then thought to be de facto segregation and de jure segregation in public schools, members of the Senate held a series of meetings to draw up language that would deal with this problem and also deal with the subject of student transportation. The result of their efforts is now 42 U.S.C. 2000 c 6(a)(2) which reads: "Nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

The amendment was promptly attacked by Senators Sam Ervin (D-N.C.) and Senator Richard Russell (D-Ga.) as a provision "to remove jurisdiction of the federal courts from any action looking to the correction of de facto segregation."[12] Speaking in defense of the amendment, Senator Leverett Saltonstall (R-Mass.) said: "I was present at the meetings when the bill was revised. . . . We tried to provide that the court would not be given any more power than it now has with respect to achieving racial balance in schools by busing of children or in correcting racial imbalance."[13] Senator Hubert Humphrey (D-Minn.) who was floor manager of H.R. 7152, said:

"Some communities are attempting to correct racial imbalances by transportation of children; others refuse to do so. The purpose of the pending Dirksen-Mansfield-Humphrey-Kuchel substitute is to make clear that the resolution of

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[11] Hearing before the House Judiciary Committee, May 10, 1972.

[12] 110 Cong. Rec. 13820 (1964).

[13] *Id.*

> these problems is to be left where it is now, namely in the hands of the local school officials and the courts. . . . *Obviously, this provision could not affect a court's determination concerning racial imbalance and possible corrective measures; this is dependent upon the Court's interpretation of the fourteenth amendment.*" [14]
>
> Senator Russell offered an amendment to strike this language from the bill. His amendment was defeated by a vote of 71 to 18 which appears to be a substantial indication that the Senate felt the courtroom was a suitable forum for airing and settling busing questions without additional legislation. From 1964 to 1970, opponents of school desegregation attempted to use this language as a limitation on the powers of the Executive branch and the courts to approve plans that require transportation of children to accomplish desegregation of public schools. Most of those who take this position ignore the clear intent of Congress as stated by Senator Humphrey and Senator Saltonstall that the amendment was not designed to restrict or expand the power of the courts to interpret the requirements of the fourteenth amendment.
>
> Because until 1970 the transportation controversy was centered mainly in the South, most northern members of Congress became involved in one of two ways. They opposed antibusing amendments as invasions of the powers of the federal courts or they joined with southern members for logrolling purposes—to reassert conservative legal philosophy or to provide political assistance to friends who could use it in their states or districts. The last category of political assistance provided the real clout for antibusing amendments. Most of what was given sounded deadly, but as a practical matter it had little effect on the courts. The main harm was that such amendments frustrated able and effective persons in the Department of Health, Education, and Welfare who were trying to implement school desegregation decisions. In addition, of course, gullible and/or obstructive state and local officials used such language to justify delay in setting up truly unitary school systems.

* * * * * * *

Mr. MITCHELL. The last of these findings is that which would make it against public policy to require racial adjustments once desegregation has been accomplished, despite later population changes. This finding is also implemented later in the proposed act by the provision, section 207, on termination of orders. This fails to take into consideration the role that government plays in the racial composition of school districts through housing, education, transportation, community services and other governmental policies and practices and how these policies result in population changes.

S. 179 represents a frontal attack on the judiciary. It seeks to take from courts jurisdiction to make any decision, enter any judgment, or issue any order requiring transportation to effect school desegregation.

While using jurisdictional language, this bill does not, in fact, prevent courts from hearing school desegregation cases. It prevents them from granting successful litigants a full remedy. Under it a court could find that the 14th amendment requires pupil transportation, but could not order public officials to provide that transportation. We feel that this is a statutory attempt to amend the Constitution and that it is constitutionally defective because Congress lacks the power to so amend the Constitution. On the practical level, if permitted, it would set up Congress as a super court, with authority to overrule any decision of a court by revoking the court's jurisdiction to render the objectionable decision.

Apparently in anticipation that the courts will not accept the legal principle the bill's author espouses, the bill further provides that when courts do order pupil transportation, the orders may not become effective until all appeals are exhausted or the time for appeals has expired.

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[14] *Id.* (emphasis added).

Thus, after 20 years of delay in the implementation of the *Brown* decision, we have a proposal to continue indefinitely the time in which that decision may become fully effective. Anyone familiar with our legal system knows that delay can become a way of life for those bent on delay, notwithstanding the expedited judicial determination provisions of the bill.

S. 287 goes much beyond S. 179. It would deny jurisdiction to Federal courts in any case involving a public school, except for appeal or petition for writ of certiorari to the Supreme Court.

While this would apply to school desegregation cases, it would also bar access to Federal courts in many other areas of constitutional law. For example, somebody mentioned this morning that they favored letting students wear their hair long if they wanted to; under this provision, that case could not get into Federal court for determination of the constitutional issues involved. Some other things that come to mind are first amendment rights relating to prayer in public schools, academic freedom, student protest; constitutionally protected property rights such as teacher tenure and pension rights; due process in teacher discharge cases, and so forth. It would lower the public school to the position of the only public institution whose activities are beyond constitutional review by the Federal courts. We see nothing in law or reason that would justify such a sweeping exemption and cannot believe that Congress will take this proposal seriously.

At a time when our country is torn by strife about whether Government officials have engaged in unlawful acts, it is tragic to see that an effort is being made to give statutory protection to acts and practices that have unlawfully delayed desegregation in the public schools. We urge that S. 179, S. 287, S. 619, S. 1737, and S. 2336 be rejected.

Senator ERVIN. Thank you very much.

The Committee will stand in recess until 3 o'clock this afternoon.

[Whereupon, at 1:15 o'clock p.m., the subcommittee was recessed, to reconvene at 3 p.m., the same day.]

AFTERNOON SESSION

Senator ERVIN. The committee will come to order.

The next witness is Mr. James Wells of the Liberty Lobby.

TESTIMONY OF JAMES WELLS, LIBERTY LOBBY

Mr. WELLS. Mr. Chairman, I am James Wells, an attorney from Detroit, Mich. I have represented Neighborhood Academies, Pontiac, Mich., the so-called freedom-of-choice schools during the busing problems of 1971. I am also a special consultant for Liberty Lobby, and appreciate this opportunity to present the views of Liberty Lobby's 20,000-member board of policy, and also to appear on behalf of the approximately 250,000 readers of its monthly legislative report, Liberty Letter.

The Pontiac school district was vitally affected by a school busing decision in 1971. Enrollment in the public school district dropped dramatically that year, while private school enrollment increased substantially. The white population began to move from within the school boundaries to other districts. NAACP predicted that within 5 years the city of Pontiac would revert to a substantially segregated school system by reason of "white flight."

At that time I was an attorney for Neighborhood Academies and enrollment in those academies, those private schools, was 400 at the height of the busing dispute in Pontiac. Other schools had waiting lists of many hundreds. But by the fall of 1972 the enrollment had diminished to 10. We kind of wondered why, so we conducted a survey of the children in the Neighborhood Academies, and it was found that 73 percent of the enrollees had moved with their families or had been transferred by their families to other school districts, often in other States.

The busing situation in Pontiac and many other communities had been further complicated by gasoline shortages. The board of education required an additional 106 buses to transport students for racial integration within the district. These buses use more than 1,500 gallons of gasoline daily. When stored gas supplies fell short recently, the school buses were filled at local service stations with consequent lineups, delays, and frustrations to the schools and citizens in the area.

Therefore, if this occurrence takes place in other areas as well as Pontiac, as I am sure it does, there will be some basis in fact—and I think there is—for the popular opinion that conservation of desperately needed gasoline has not been allowed to interfere with the socially oriented goals of the Nation's social planners.

And I think the Civil Rights Commission, who were on earlier today, would be representative of that type of plan that I am talking about.

It is further noteworthy that on January 6, 1974, the director of transportation of the Pontiac school district announced that supplies of gasoline to the schools were exhausted, and that the schoolbuses would be filled by local filling stations in competition with the public, since the school would pay the prevailing retail gas price.

S. 1737, to amend the Civil Rights Act of 1964, tends to answer the questions raised by the U.S. Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*. There was some confusion on the part of the Court as to whether the plain language of the proviso in section 2000c(b) and 2000c-6 said what it meant, or meant what it said.

Congress clearly said—and I do not think that the man in the street would be confused with this langauge, but the Court seemed to be.

> Desegregation means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance. * * * Nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

This bill should clarify the matter for the Court. It will be recalled that the Court interpreted the legislative history of the act to indicate "that Congress was concerned that the act might be read as creating a right of action under the 14th amendment in the situation of so-called de facto segregation. * * *"

The legislative history of this bill, together with its reference in S. 1737 to the Court's jurisdiction, should leave no room for doubt of the bill's intent. Nevertheless, discussion on this point is necessary in the history of S. 1737, since the Court previously has questioned whether the Civil Rights Act did "withdraw from courts historic equitable remedial powers."

Turning to S. 1737, Senator, I note in section 1207, line 13—12 and 13—the following is stated: "No courts of the United States shall have jurisdiction to make any decision or enter any judgment or make any order" and so forth.

I would suggest, Senator, that three words be added between the word "jurisdiction" and "to make any decision." Those words would be "legal or equitable."

I think Senator Ervin, being a former supreme court judge, would understand that if we do not add those words, we are going to run into trouble; and I will explain how.

The Supreme Court, in reviewing cases involving the Emergency Price Control Act of 1942, announced the following doctrine "unless a statute in so many words, or by a necessary and inescapable inference, restricts the scope of that jurisdiction is to be recognized and applied."

This doctrine was based upon a dictum casually written in an 1836 opinion, *Brown* v. *Swann*, 10 Peters 497, 503. The extension of this doctrine of doubtful origin into schoolbusing has been disastrous. Schoolbusing has become punitive in character, since its benefits have been considered negligible or nonexistent by educational authorities. The 1836 opinion also stated that, "equity will be converted by the section into an assistant for the enforcement of a penalty; which has never been its province."

That is the situation that we are facing in busing right now. We have that situation before us.

I would further note that the language that I read earlier from the Civil Rights Act of 1964 has been repeated in the Higher Education Act and its amendments right on through 1971. The courts, the Federal court system, have uniformly neglected to observe that language. They do not understand it apparently, or they choose not to understand it.

I think that it has to be changed, and they have to spell out equity and draw jurisdictions.

This bill should further remedy not only the wastage of gasoline and the transportation of students to achieve social policy by judicial decree, but may well prevent further resegregation in existing desegregated districts by eliminating the need felt by some parents to move from the community.

I would note parenthetically here at least in the Pontiac area, the Detroit area, which I am familiar with, open housing has been successful. I think minority groups have made more progress in the last 20 years than it had in the previous century. And this is where the real progress is taking place.

So this bill would seem to also satisfy those who take the view that they will not conserve this fuel in a critical time when school buses are running for social purposes; and they may alter their view upon passage of this bill.

It seems clear to us that national policy in a time of crisis must override far-reaching social planning schemes where reinforced by judicial edict based upon judicial misunderstanding.

I would like to note that Mr. Horn's comments earlier with respect to whether the Congress had the power to do anything about the Supreme Court's views, I think, of course, the Constitution answers that in plain language.

I would also note that in regard to the cases that he cited, that the Supreme Court was in that very year, 1867-68——

Senator ERVIN. Pardon me.

There is a vote on the floor. Perhaps I had better go and vote and come back just as soon as I can. I will be back just as soon as I possibly can.

[A brief recess was taken.]

Senator ERVIN. The committee will resume.

TESTIMONY OF JAMES WELLS, LIBERTY LOBBY—Resumed

Mr. WELLS. Mr. Chairman, I believe I left off at the point that I was attempting to answer Mr. Stephen Horn, U.S. Commission on Civil Rights. He felt that the Court could not be restricted in any way by Congress; or he did not think that the restrictions could go so far as to eliminate jurisdiction where a question of constitutional proportions were involved.

I would, of course, reply to that and respond in this fashion. During the same reconstruction era that he cited, the Supreme Court had its bench reduced by two members by Congress, and as those members resigned or died, the Court was restricted in its membership. At the very same time Congress said we may have to reduce this to a single member Supreme Court, and we have the power to do so.

If there is any question, I think that answers it. Congress has the power. They have exercised it in the past. I would note that right after that, under the doctrine of extension, the U.S. Supreme Court in 1869 in *Texas* v. *White*—that is 7 Wallace, page 700—backed away from the issue of declaring the Reconstruction Acts unconstitutional, which was a wise decision on their part. And I think we could expect that the Supreme Court today would not follow the liberal tendency of some of the people that I have heard today, and will follow the same policy.

In conclusion, I would say on behalf of the Liberty Lobby, it is the combined judgment of Liberty Lobby and the vast majority of citizens as shown in all polls that busing of schoolchildren to create a racial balance has proved to be a punitive act against the best education of children. We believe that the passage of S. 1737 or similar legislation will take care of congressional opposition to a constitutional amendment against busing, and yet fill the legal vacuum needed to stop the useless and unnecessary busing of children away from their neighborhood schools—and against their parents' wishes.

I think if the language I cited in that section 1207 restricting specifically equitable jurisdiction where we say, "No court of the United States shall have jurisdiction, legal or equitable to make a decision" and so forth, that would perform the necessary changes.

I got the feeling this morning as I listened to the gentleman from the NAACP, as well as the Civil Rights Commission, that almost tongue in cheek they were saying that this bill would perform the job of curtailing the Supreme Court. I do not think that is true. It did not curtail the Supreme Court's powers when they ruled virtually the same language; and the Civil Rights Act did not restrict its equitable jurisdiction.

I think what they are saying is that we have to hold that the equitable jurisdiction is restricted.

I would like to thank you for the opportunity to appear today and to present our views.

Thank you.

Senator ERVIN. As I understand it, you suggest that S. 1737 be amended in section 1207 by inserting after the word "jurisdiction," "legal or equitable".

Mr. WELLS. Yes, sir.

Senator ERVIN. That is a very good suggestion. My father practiced law in North Carolina for 55 years. He used to say that when you were trying to prove to a judge that a certain animal was a horse, it was best to draw the picture of a horse and then write under it in very big letters, "This is a picture of a horse."

I think that this bill is in perfect harmony with the equal protection clause of the Constitution. As I construe the *Brown* case, the *Brown* case decided that it was a violation of that clause to exclude a child from any school on account of the child's race.

S. 1737 would allow every child or the parents of the child to make a choice of the schools their children would attend. There would be no exclusion for anybody from any school on the basis of race.

It would be a unitary school system in that no child would be excluded from any school on account of race. And, it is perfectly in harmony with the Constitution. It only undertakes to restrict the Supreme Court to its constitutional sphere, to keep it from altering the doctrine of the equal protection clause.

Mr. WELLS. It might put them out of the judicial legislation.

Senator ERVIN. I was very much amused by Mr. Horn's invoking the Voting Rights Act of 1965 today, because that act which he strongly supported, had a provision that the States and the counties to which it applied would be condemned on the basis of two certificates made by the Attorney General of the United States and the Bureau of the Census; and that no court in the United States could contest the validity or the accuracy of either one of those certificates.

Not only that, it deprived any court of the United States the power to investigate and determine the truth of those certificates. It also enabled the Government to close the door of every courthouse in the United States except one, in the District of Columbia.

Mr. WELLS. I think Mr. Horn represents the way of Federal liberalism that we have seen in the last 40 or 50 years coming upon this Nation. I myself—and I believe Liberty Lobby agrees that when reading the Constitution, we have to look at the spirit of it. We have to read it very closely and restrict it, not expand upon the extent that it means, not what it was intended to mean.

Senator ERVIN. One of the greatest things ever said by a Supreme Court Justice, in this regard, was Supreme Court Justice Mar-

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shall when he was trying to be persuaded that a statute was inconsistent with the Constitution. He said the reason that the oath of office was placed in the Constitution was so that the judges would accept the Constitution as a rule or the guide for the Government of their official actions.

I want to commend the Liberty Lobby as I have observed it in the 20 years I have been in Congress. It has been faithful to the concept of the Constitution and also to the concept that the Constitution is designed to give the American people just as much liberty as they can exercise without hurting others. And I think that this is what is at stake in this matter.

I also infer that you have another thing in common with me; that is, I do not like judicial activists—whether they are judicial activists on one hand that stretch the Constitution far beyond its true meaning, or those who on the other hand interpret the Constitution so that it is restrictive far beyond what its true meaning is.

Mr. WELLS. Thank you very much.

Senator ERVIN. Thank you for a very fine statement.

Our next witness is Mr. Charles Morgan, Jr., who speaks for the American Civil Liberties Union.

TESTIMONY OF CHARLES MORGAN, JR., AMERICAN CIVIL LIBERTIES UNION

Mr. MORGAN. Senator, our testimony has been previously provided to you; and I trust that it can be included in the record without my reading it.

Senator ERVIN. It will be included in the record.

[The prepared statement of Charles Morgan, Jr., follows:]

PREPARED STATEMENT OF CHARLES MORGAN, JR., DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman and members of the Committee, thank you for the opportunity to testify here today. Before moving to my present job here in Washington about 14-months ago, I spent eight years directing the Southern Regional Office of the American Civil Liberties Union, now an organization of 275,000 members. There I was engaged in the trial and appeal of civil liberties and civil rights cases throughout the South.

From 1955 to 1963, I practiced law privately in Birmingham, Alabama. I am a graduate of the public schools of Birmingham, the University of Alabama, and the University of Alabama School of Law.

I appear here today on behalf of the ACLU to express our opposition to the proposals being considered in these hearings.

Mr. Chairman, it was almost two years ago that this Congress was considering a number of proposals similar to those before you today. Chief among them was the so-called "Equal Educational Opportunities Act of 1972," sponsored by the Nixon Administration.

In frequent appearances before many committees, ACLU representatives urged the Congress to reject those proposals. We did so for a wide variety of reasons—all of which I believe have been proven valid by the test of time—but among those many reasons there was always one consistent, underlying theme.

That theme was then, and remains now that all of the proposals now before you will have one effect: namely, they will result in the undermining of the authority, the integrity and the independence of federal courts under the Equality Amendments, and with them, the general public respect for law and order.

I can think of no committee, and Mr. Chairman, I can think of no individual Senator, in whom the American people place more faith when it comes to the Bill of Rights.

Indeed, if I may make a brief personal reference, I would like to say just one word as a Southerner. I think the people of the South believe, perhaps even more strongly than those from anywhere else, in the concept of law and order. I think the South has shown this in the peaceful way in which the overwhelming majority of white Southerners have acknowledged the rule of law, and the decisions of courts, regarding desegregation and the right to equal protection of the laws.

For the Congress now to enact legislation to undermine those principles—legislation which would say, in effect, "never mind those changes so recently made"—would be tragic. It would be a betrayal of those thousands of Americans who, often at great personal risk, placed themselves squarely on the side of the law in the twenty years since 1954.

Yet the four bills under consideration would do just that.

We see one bill, for example, S. 287, which would actually remove *all* public schools cases from the jurisdiction of the federal courts. That is so extreme, I think we need not discuss it here.

Another bill, S. 179, simply says no federal court may require that any pupils be transported to or from school on the basis of their race, color, religion or national origin. Again, we see the goal of undermining the ability of the courts to redress a denial of constitutional rights, even though that denial has been established by a thorough, fair and impartial hearing in a court of law.

Another bill, S. 619, stresses pupil assignment on a neighborhood basis. At first glance, but only at first glance, this concept of the "neighborhood school" sounds innocent enough. It even sounds appealing, conjuring up as it does the images of some of our childhoods—of laughing children skipping through falling leaves, or crossing a grassy field to a nearby school.

The trouble is that many parts of America—by choice—gave up the neighborhood school decades ago. They chose the consolidated school for its better educational facilities, and the bus as the only way to get there.

The other trouble is that in many other parts of America—mainly urban America—neighborhood schools mean segregated schools. They mean segregated schools because of the realities of continuing racial discrimination in jobs and housing, which means segregated neighborhoods.

And the fact is, Mr. Chairman, and we all know this, as a central truth: "white folks ain't going to pay for schools where white children don't go." So when certain schools are all-white, and others are all-black, more tax money, more books and more facilities just somehow always find their way to the white schools than to the black.

Nothing supports the assumption of *Brown* v. *Board of Education*, 347 U.S. 483 (1954)—that slum schools cannot be equalized—more than the reasoning and evidence of pre-*Brown* teacher pay, graduate and law school and undergraduate school decisions including *Sweatt* v. *Painter*, 339 U.S. 629 (1950) [the Texas Law School case]—and more obviously the millions of uneducated black men and women in the North's urban ghettoes, sixty per cent of whom were born *and reared* below the Mason and Dixon Line.

Conversely, after desegregation, those same monies and equal school benefits suddenly begin finding their way into all schools on a fair and equal basis. As a black parent from North Carolina put it in a letter to the Washington Post two years ago: "Within one month (after desegregation), the parents of the white children who were being bused managed to get the black school painted, repairs made, new electric typewriters and sewing machines, and the shelves filled with books."

Again recalling my own Southern experience, I know how recently the concept of "neighborhood schools" suddenly wrought such concern. It usually coincided with the time when desegregation was at hand. Neighborhood schools were not always sanctified, in fact, by school systems as recently as the late 1960's where black children were bused as far as 60 or 80 round-trip miles to keep them out of their neighborhood, but white, schools.

One of these bills, S. 619, also cites "serious risks to the health and safety of students" and "risks and harms" supposedly created by busing.

Yet figures from the National Safety Council establish that school busing is actually the safest form of transportation in America—and that includes *walking* to school. ["Your Child and Busing," U. S. Commission on Civil Rights, May 1972, page 13.] Indeed, in some urban centers at peak traffic hours, walking may be the least safe way for children to go to school.

As for "risks and harms," I assume the bill's authors are referring to some alleged psychological damage caused by riding on a bus.

The only truly scientific study on this subject was by one of the nation's most noted child psychologists, Dr. Robert Coles. Dr. Coles rode buses with school children as they traveled to and from newly integrated schools. Based on more than one year's study, he said:

"I never saw children get sick because they were being bused; I never saw children become emotionally disturbed because they were bused; I never saw children's school work suffer because they were bused. Physically, psychologically, educationally, the experience of busing was, in fact, neutral. [Dr. Robert Coles, testimony to the Senate Subcommittee on Education, April 6, 1972.]"

A fourth bill before this committee, S. 1737, refers to "freedom of choice." Like the phrase "neighborhood schools," "freedom of choice" sounded innocuous enough at first hearing.

The problem is, experience has shown that freedom of choice, where tried, was not free. Many ways were found to intimidate and thereby inhibit black children who sought to exercise that freedom, until many of them gave up. Schools remained segregated in fact, if not in name, and the Equality Amendments, along, of course, with black and white children and their chances for a better life through better education, were the victims.

Each of these bills, then, as with all other attempts to draft anti-busing bills, relies on denying our courts the power to enforce the Equality Amendments.

That is reason enough to reject any and all such proposals. But there are other reasons, and I would like to summarize them briefly.

First, these proposals are anachronisms, for the fact is that school desegregation is no longer a major public issue. With the exception of local problem areas whose difficulties should be worked out locally and in accordance with the law, there is simply no public demand for anti-busing legislation. A national law passed to meet an isolated problem might create far more severe problems in a dozen other locales.

Americans are law-abiding people. Two years ago, we quoted many youngsters from many schools, north and south, who said they could get along fine with one another, and their schools could operate peacefully, if adults would just leave them alone and quit stirring up trouble.

We believe the evidence shows that this has happened. Trouble has not been stirred and Americans have again proved law-abiding. They have reached peaceful accords with conscience and the Constitution.

Studies of school desegregation have demonstrated over and over that when citizens of good will made up their minds in advance that they would obey the law and plan their schools accordingly, desegregation took place peacefully.

Where disturbances occurred, they were invariably the result of groups of adults picketing, blockading, shouting obscenities at each other and at little children, even throwing rocks or burning buses. When the adult protests ended, so did disturbances among the youngsters.

The point is, our schools are desegregating peacefully. If there is an isolated case of a badly drawn desegregation plan, the solution is not to upend the law and reverse the gains that have been made (as could be done with the re-opener clause contained in one of the proposed bills, S. 619). The solution to those problems is certainly not new national legislation. The solution for isolated cases is simply the drawing of new and better, if isolated, plans.

Whether politically disastrous or not, two effects of enactment of these proposals will be the stiffening of opposition to desegregation and a simultaneous weakening of the resolve of courts to effect the mandates of the thirteenth, fourteenth and fifteenth amendments.

One effect these proposals definitely will not have is to diminish the desegregation "burden" borne by the white working class. The elimination of busing will not prevent the use of pairing and other desegregation techniques. Buses will continue to transport white and black children to the consolidated schools of the rural south. In southern urban areas those who reside nearest each other—the white and black working class—will be desegregated. Only the white upper middle class children will be sheltered from desegration and further locked into a Brahmin caste school system which will continue their uneducation in unreal seclusion from the very real world they will soon face.

The other reasons for rejecting these proposed bills go to the myths about desegregation and busing itself. I would like to summarize them briefly.

First, busing is not being ordered by the courts in any wholesale or haphazard way. It is ordered only when it is the only remedy for the redress of constitutional deprivations.

Second, busing is not used to achieve "racial balance," as so many detractors claim. The courts, in fact, have specifically *forbidden* busing for racial balance. The Supreme Court stated in *Swann* v. *Charlotte-Mecklenburg Board of Education* 402 U.S. 1 (1971), that "the use of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement."

Third, busing for desegregation is certainly not "massive," although that word is constantly used by backers of the type of legislation now before this committee. In fact, of the more than 20 million school children who ride school buses, less than three-percent ride them due to court orders. [Testimony of Elliott Richardson, Secretary of Health, Education, and Welfare, before Senate Subcommittee on Education, March 24, 1972.]

In other words, if all court-ordered busing were halted today, 97% of all youngsters who ride school buses today would still be riding them tomorrow. I think that fact alone should be enough to demonstrate the needlessness of the legislation proposed here today.

Fourth, anti-busing advocates contend that some rides are too long and schedules disruptive. In fact, rides are shorter in many places since desegregation than they were before. And in the few places where schedules are a serious burden on parents, the need is for better planning, and modified desegregation plans, not national legislation.

Fifth, some have implied that court-ordered busing is bankrupting school systems. The fact is that the percentage of education money spent on school transportation is virtually the same (3.6%) as it was 40 years ago (3.5%). ["Your Child and Busing," U.S. Commission on Civil Rights, May 1972.]

In sum, school busing is nothing new. We have been busing school children for about 60 years. Busing only came under attack when used as one device to bring about school desegregation and equal protection of the law.

In view of the Congress's often-stated determination to afford all Americans their full rights under the Constitution, and in view of the fact that all these bills would undermine the ability of our courts to insure those rights, I respectfully urge this committee to reject the proposals being considered today.

I believe this is especially urgent because of the damaging impact these bills would have on our system of law. At a time when this committee is so uniquely charged with the responsibility for protecting civil liberties, rights endangered now more than ever, and a time when this body may soon be called upon to make a decision fundamental to the very future of the rule of law in our society, we respectfully urge that you set aside these proposals of the past and move instead with our children into a future where freedom is the promise of equal education.

Thank you very much.

Mr. MORGAN. I have been here a brief while, and I have heard some of the previous testimony. The cases which indicated freedom of choice might be constitutional—the *Green* case and its companion—assumed that "freedom of choice," would be a phrase which contained the promise of constitutional equal protection. And it seems to me any legislation to effect that free choice would nave to have within it sanctions to make absolutely certain in the light of our history for the last 20 years that the choice was in fact free.

For example, I notice in the bills before you, and more particularly Senate 1737, no criminal provisions to make certain that any person who interfered with or placed any pressure on the free choice of any citizen of the United States or a child of any citizen, be it economic pressure, or that of State or local government, or otherwise pressured by force or violence or the threat of force or violence, suffered criminal sanctions.

Second, I see in the freedom of choice bill, which relates to teachers as well as students, no provision that would provide for equal employment guarantees for the teachers.

I also find in that bill no provision for the abolition of disparate property taxes. I believe that there might be a more free choice if property taxes nationally were equalized. The ACLU has no position on that aspect of the bill. But I think that is something that might be pertinent to making certain that people actually had a free choice.

You mentioned a moment ago a discussion of judicial activists; and I frankly have never thought of the courts as having lifetime Federal job purpose other than the defense of the constitutional rights of individual citizens or groups of citizens who might be in fact discriminated against or put upon by Government or others.

In the particular instance that we are dealing with, of course—the *Swann* case—which came out of Charlotte, N.C., and its companion case out of Mobile, Ala., the opinions as I recall it were written by Chief Justice Burger.

This administration, went into office under what was generally termed a southern strategy in its desegregation program. Yet Chief Justice Burger is the author of the prime opinion in the major case authorizing school busing as a partial remedy for school desegregation.

Third, with respect to the Voting Rights Act of 1965, which you mentioned a moment ago, I recall the case name—*Gaston*, I believe, a North Carolina case, where a very conservative justice discussed the right to vote. And the thrust of his opinion was that when people had been deprived of an equal education by the State, that State could thereafter not impose a literacy test or a literacy requirement on their right to vote.

I believe personally and deeply that that relates to the major question we have here.

I notice that from the last witness, there was a reference to *McCardle* and *Milligan*. I have read them previously but not while I have been here. I did read the Constitution a moment ago—the appropriate provisions.

If the courts are statutorily limited in their jurisdiction with reference to past cases effecting remedies, for constitutional wrongs, I think that the limiting statutes would be in effect ex post facto laws. If the courts could be limited in their jurisdiction in the future, the lower courts, I wonder if we would not merely take all the school desegregation cases and put them into the Supreme Court of the United States as actions against States.

Senator ERVIN. That would be better than what is being done.

Mr. MORGAN. Under that circumstance I think that we would go back to another case that I read recently, the *Shipp* case, which was a contempt case involving the sheriff in Chattanooga, Tenn., who allowed a black prisoner to be strung up. And in that case the Supreme Court appointed an examiner, or a referee, or a special master, if I recall correctly, to hear the facts and evidence. The Supreme Court is trying to divest itself of jurisdiction in certain fields. But under these circumstances, a Supreme Court of the United States, consisting of 9 people, or 1 or 10 or however many justices, could develop into the largest single school board in the United States of America; and could appoint masters to handle all the schools in the United States.

Senator ERVIN. They are doing that now through the district judges.

Mr. MORGAN. Let us talk about the district judges just a moment, Senator.

Senator ERVIN. I do not think that would change the situation at all.

Mr. MORGAN. The Federal district judges, the district judges that we are talking about in the South are, in the first place, all white—not that that is for or against them. They happen to be all white. In the second place, they are preeminently conservative.

Senator ERVIN. You call Judge Wisdom, Judge Brown, and Judge MacMillan conservative?

Mr. MORGAN. Let us put Frank Johnson in there, too. I call them conservative. I will tell you why.

Senator ERVIN. Why?

Mr. MORGAN. Those gentlemen were all appointed by the Eisenhower administration. They were all selected from the Republican Party, pre-1964 Goldwater Republican Party. They were all picked from a party that was essentially a political party of loners. And we have named only four U.S. district judges or court of appeals judges. That is all we named.

Most of the Federal judges in the South are in office because they were at least approved by the Members of the U.S. Senate from their State; and most of them came out of the State party structure in their States; and most of them—I am not talking about a formal allegiance or anything improper with respect to their oaths—are not men who do not understand politics and the ways of the South, the ways of white folks in the South.

Senator ERVIN. They also understand that they dare not tamper with an integration case for fear that it would be reversed on high.

Mr. MORGAN. Let us take the *Mobile County* case—Davis. I think that the 12th time that case was appealed to the U.S. Court of Appeals, fifth circuit—the lead of the case, the opinion's first line, I think, was "this case is an Homeric Odyssey. We do not now stop to count the times it has been before this court."

When it finally got in the Supreme Court in 1969, they went along with busing. It seemed to me when that happened, that the district judge had done about everything he could to prevent it.

He slowed whatever progress there was in Mobile. Nobody ever accused him of being a judicial activist or putting a trigger on civil rights. Under that circumstance, that case, it took a considerable number of years to desegregate. I do not know if the Supreme Court is going to go any slower if they set up a bunch of masters in order to deprive jurisdiction of these southern Federal judges.

I have a more difficult time than do some of my companions on what the power of Congress is with respect to the limitation of the jurisdiction of the lower Federal courts. Thus, I pose certain problems to which I do not know the answer. Could the Congress, for instance, pass a statute saying that the U.S. courts are deprived of jurisdiction to issue injunctions against Army surveillance of civilians?

Could they deprive courts of the right to issue an injunction under the first amendment, for instance, to prevent the harassment or the enforcement of restrictions on citizens exercising their rights of freedom of speech?

Could the Congress pass a bill which said despite fifth amendment due process and the sixth amendment guarantee of right of counsel the Federal courts are deprived of the right to appoint a counsel in the case?

The appointment of counsel in a case, it seems to me, is a way to effect or achieve a remedy. Could the Congress deprive the Federal courts jurisdicition of defense of any of the first eight amendments or rights?

What about the writ of habeas corpus?

Senator ERVIN. The *McCardle* case was being argued and it was under advisement by the judges at the time the Congress passed the law.

A man was arrested by a military commission, although a civilian; held by military courts for trial in violation of the Bill of Rights that guarantees an indictment and grand jury protection, and trial by jury, and trial in civil courts. And also, he was merely exercising his first amendment rights of freedom of speech of the press.

Mr. MORGAN. The writ of habeas corpus is qualified in the Constitution. The writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it.

Senator ERVIN. The court was just deprived of its jurisdiction to hear a case involving habeas corpus. It did not keep the court from issuing a habeas corpus. It just kept it from making any decisions.

Mr. MORGAN. Would we think today in 1974, under the circumstances under which we live, that the Congress should be able to deprive the courts from granting habeas corpus in the event that the Executive or the Army acts to pick us all up. I do not think so.

Senator ERVIN. As a matter of fact, that is still one of the great questions. The article about the civilian habeas corpus was article 1 that defines legislative powers. And President Lincoln suspended it during the Civil War, and he had no authority to do so.

Mr. MORGAN. We can contend that, but he still did it. The provision says when in cases of rebellion or invasion the public safety may require it.

The thrust of our testimony goes to the question of busing—the prepared testimony, the testimony that we presented here. We are talking about the essential question of the effects of the school desegregation order that affects some children in the United States.

It is a shame children are to be used in that process. It is a shame that any generation of Americans have to be put to the kind of problems which erupts over the aberration of statutory discrimination against one segment of the population.

I particularly wish that it had not happened when it did happen. I wish it had happened in 1869, 1870, and 1871: and I think we would have been over all of these things.

I come to different conclusions from others about the impeachment trial of Andrew Johnson. I think he was probably charged on the wrong grounds. He probably should have been convicted on others. We would have been all better off right now. We would not be discussing this question because it would have been all over.

But one thing I do know is that the court system of the United States, especially now, runs the risk of being the kind of court system which the very people of the United States who are the most in need of it do not have faith in.

I would like to go into that for just a moment. I am reasonably well convinced that in the last 10 years the American people—as a result of three assassinations: President Kennedy, Robert Kennedy, and

Martin Luther King, the shooting down of George Wallace, the nolo contendere plea of Spiro T. Agnew, questions with respect to the President, and the war, no matter which side of the war people were on—have very little to be proud of. That is the one aspect of what I want to present.

I am not saying we are not a great country. I just feel a lot of citizens do not feel much to be proud of.

Additionally, 60 percent of the black citizens of the United States who live outside of the South above and beyond the Mason-Dixon line were born and reared in the South.

Senator, the last school desegregation case that I was in was the University of Alabama desegregation a little over 10 years ago. Most of the work that I did on the South over a period of years, the important work was the desegregation, county by county, of juries, and the desegregation of the administration of justice by affirmative Federal court remedial orders.

And the second aspect of that work was just securing the right to vote. It always seemed to me that people who go to black people outside the South and say to them "take your struggle out of the streets and into the courts," are talking to people, for whom the law, the courthouse, was not there.

One of the biggest problems we have had in this country is to have people who are essentially deprived of the protection of law included in the legal process, so that they will have a respect for law.

That is most of the work that I have been involved in, not schools, but the other aspect of it. It always seemed to me that you could not expect any kind of free choice—black folks, for instance, would not send their children to school if they did not have fair juries, because that is one of the techniques of eliminating some of the community pressure which takes away from free choice, the right of free choice.

We live in a time where there is an assault on the Bill of Rights every place we look and upon guarantees of the Bill of Rights. Nobody in this country is more familiar with those than you.

We have had an administration elected which has made appointments to the courts to restrict the rights of citizens under the Bill of Rights. We have had problems of encroachment by one Government agency or another and behavior by Government officials which smacks of tyranny.

And under that set of circumstances it seems to me that all of us who have respect for and revere the Constitution of the United States must take every step possible to make absolutely certain that the least of us knows the most of us are there with power to protect their rights.

Regardless of the merit or demerit of this piece of legislation and the allied pieces of legislation, it seems to me that that is not the impression that citizens will glean from their adoption.

That appearance, it seems to me is quite important to our country at this time.

Senator ERVIN. Mr. Morgan, I agree with you on your observation on the Bill of Rights. But there is nothing whatever in the 14th amendment to give Federal courts the power to deprive little children of their liberties, and I think that forced busing, which denies little children the right to go to their neighborhood schools, and compels them to be transported hither and yon over the face of the earth merely to put bodies into school, is the most atrocious assault on our liberty known to the American people. This business of using little children—some commentator wrote some time ago that they bused the little children and mixed the children just to show that schools are not excluding people from the schools because of race. He says it would be just as logical to send out the Armed Forces or the police forces to compel adults to go swim together in swimming pools, just to show that the swimming pools have been desegregated.

I do not see how it can be clearer than this. This bill says freedom of choice system. It means a system for the assignment of students to the public schools and within public schools, maintained by a school board operating a system of public schools, in which the public schools and the classes it operates are open to students of all races, and in which the students are granted the freedom to attend public schools and classes chosen by their respective parents from among the public schools and classes available for the instruction of students of their ages and educational standards. If the school board does not maintain that kind of system, it is not covered by this act. You have to maintain that system to come in the purview of the act. If you do not do that, then all of these other judge-manufactured remedies are available to anybody concerned.

Now, you criticized the bill, because you said it did not have a provision in it prohibiting discrimination in employment of teachers. That provision is already in the fair employment practices section of the Civil Rights Act of 1964, and it does not need to be set out here again. And also you say it does not have a lot of other provisions. We would have to rewrite the entire criminal code to make it conform to your notion about what you think it ought to be, if you are going to deal with individual remedies.

We passed a law a few years ago that said interference with constitutional rights would be a criminal offense. When I offered an amendment to make it a criminal offense to interfere with a man's right to work by force, it was voted down, because the unions like to employ a little force sometimes, and they have a large amount of influence in this.

I think the *Green* case, as I said this morning, when you get through analyzing it, holds that our freedom of choice system is perfectly constitutional and valid, provided that the little children exercise their freedom of choice in a manner that is pleasing to the undefined notions of the Supreme Court Justices; but if they exercise their freedom in a manner that is displeasing to the Supreme Court Justices, they cannot have any freedom of choice. I deny that the Constitution of my country makes anybody's rights hang on such an arbitrary and contiguous legal string as that, but that is what you have in that case.

Frankly, it almost causes me to shed a tear to have an organization like the Civil Liberties Union, which has always sought to protect the right of Americans, come in here and say that we must continue to deprive little children, both black and white, of their freedom to attend schools selected by them or their parents, and make them attend schools selected by people who think that children ought to be converted into guinea pigs for social experiments—it does grieve me to have an organization like yours take such a position, so inconsistent with everything that it has always stood for throughout the ages.

Mr. MORGAN. Senator, we grieve also at the fact that we disagree in this matter with you, for we recognize you as a defender of the Bill of Rights. When we get to the 13th and 14th and 15th amendments—the equality amendments—we do take a position that there is an affirmative and positive mandate on the country and its Government to remove the badges of slavery from those that were slaves, and their children and their children's children.

I want to mention a problem to you——

Senator ERVIN. Just 1 second. That is exactly what my bill, the freedom of choice act does. It says to little white children, little black children, you shall have freedom to attend the school of your choice.

Mr. MORGAN. In the *Rainey* case, which I recall was a companion case to the *Green* case, the Supreme Court looked at the facts in that case, and they said, "you know, they have freedom of choice, but nobody seems to be there."

Senator ERVIN. They looked at the schools, and they said they established freedom of choice, but enough of the white children did not exercise their freedom of choice like we, the Supreme Court Justices, think they ought to, and preferred to go back to the white schools. They ought to have exercised their freedom of choice in a manner that is pleasing to us and go to the black school. And also, since a fewer number of the black students exercised their freedom of choice and did not go to the white school, they said they have got to exercise their freedom of choice in a manner that pleases us, and not them.

Mr. MORGAN. Under this freedom of choice plan, then, if there is actually free choice, would the students be entitled to State-paid busing at the school of their choice that they wanted?

Senator ERVIN. If it were necessary.

Mr. MORGAN. Who would determine if it was necessary?

Senator ERVIN. The school board, I would say, primarily.

Mr. MORGAN. You and I both know that there are places in the South—there are many Souths. We know that there are counties, even, that seceded from States when they seceded from the Union; but we know that there are places in the South where freedom of choice would mean that the biggest fellow on the block, the biggest man in town, will keep the schools white and the schools black, depending on which way that he, or the group in power, decide that they be. What will we do about that?

Senator ERVIN. They could not do it. They would have to give everyone freedom of choice. If that meant interfering with the right of any children to go to school he is subject to prosecution under the Civil Rights Act if he could influence the school board to act with him. It has been on the books more than a hundred years. We do not need any more new laws on that.

Mr. MORGAN. Now, I am not disagreeing with that. Probably in 1954, if we had enforced the laws, the Civil Rights Act, in the United States, it might well have been that we would not have needed them. It was rare that a prosecution was undertaken.

Senator ERVIN. The thing to do is to punish the people that deprive people of rights, not take rights away from little children, who are certainly not responsible for what is happening.

Mr. MORGAN. Let me mention one more thing to you. Let us exclude race problems for a second. As I see this piece of legislation, as I see any piece of legislation, that does go to affirmative plans to desegregate and to the use of transportation in those plans, I see the continued existence and the growth of rich folks' schools and poor folks' schools; of suburban school systems, where 99 percent of the children go to college, and of school systems where only poor blacks and poor whites go together, because they are paired and they are put together in an area.

It has always seemed to me that young people learn more from young people than they do from teachers, and that children who grow up playing together, working together, get along better later on in life. I do not think there is any problem for young people. They are not seen running around all over the place seeking their right to go to school wherever they want to, their parents are.

Senator ERVIN. You want to make the young people solve their problem. So you take the little children and deny their rights because of the misconduct of somebody else.

Mr. MORGAN. It grieves me, Senator, that those young people are in a position where they have to. It is not their fault, but we are responsible for making changes so that they can have their rights.

Senator ERVIN. Although it is not their fault, you say you must pick them up, even though they live across the street from the school, and deny them the right to go to that school, and put them in a bus, and keep them in there for miles and miles?

Mr. MORGAN. We did that for 60 years.

Senator ERVIN. You said that is not their fault?

Mr. MORGAN. We sent black children for 60 years.

Senator ERVIN. As I said this morning, there are two kinds of busing. There is one busing for educational purposes—that is where a child is bused to the nearest school available to the children of his age and scholastic attainments, which is designed to enlighten minds. The other class of busing, that is busing for integration purposes, is not designed primarily to enlighten minds, but to mix bodies, to integrate bodies.

Mr. MORGAN. Yes, I think that is right, but some of us believe that the mixing of those bodies, the placing of those people side by side in that school system, has a positive educational value with respect to race, and perhaps with respect to class.

Senator ERVIN. Therefore, you think that educational value, as you see it, is so great that a country that declares in its Constitution that what the Constitution has ordained and established to secure the blessings of liberty should take and destroy liberty in order to require your notions to be implemented?

Mr. MORGAN. No, sir. I believe in a country where you have the 13th, 14th, and 15th amendments, as a promise to the citizens who were placed in bondage in this country, that we as a government and as a whole people will enforce the mandates of the promise of equality, and give your children an opportunity to be free in God's promised land.

Senator ERVIN. The 14th amendment applies to the States. The equal protection clause applies strictly to the States, and it says that no State shall deprive any person of equal protection of the law. And that is interpreted to mean that no State shall treat in a different manner, persons similarly situated. And here, the modern interpretation, the one you are sustaining in your position, is that the Federal Government comes in and says to a State in this busing business: You have got to deprive the children in this school district of the equal protection of the laws by treating two groups in different manners, although the two groups are similarly situated. You must say to one group, you can attend your neighborhood schools. You must say to the other group, you cannot attend your neighborhood schools; and there is the Federal Government saying to the school board, you must violate the equal protection clause by treating these two groups of children differently.

Then they say further, the reason that you are required to treat these two groups of children differently is because you must take one group and bus it to schools elsewhere, either to increase the number of children of that race in those neighborhood's schools, or to increase the number of children of that race in schools elsewhere. And with oceans of sophistry, you cannot wipe out the plain fact that that is denying the children who are bused of their right to attend that school on the basis of race and that is a violation of the decision in the *Brown* case.

Mr. MORGAN. Nor can I erase that, following the Civil War, the War between the States, blacks were brought back into the same sort of a system from which they had left previously, and were deprived of their right to education, and deprived of the right of equal opportunity for employment, and deprived of a right for schools. And now we have Federal court orders to remedy the past wrong. When a Federal court issues an order to remedy a past wrong, then it seems to me the Federal court has the right to rectify whatever existed with respect to discrimination against a class of children.

Senator ERVIN. Would you right the wrongs this way, by depriving the right of liberty to little children who were not responsible for slavery and were not responsible for the right and wrong? You should, in your statement, support my bill, because my bill treats black children and white children and brown children and yellow children exactly alike. It says to each one of them—their parents can select the school that they are to attend. That puts them all in the same place exactly.

Mr. MORGAN. Your bill rejects the history under which we both grew up.

Senator ERVIN. If I have to reject freedom in order to stick to history, I will choose freedom.

Mr. MORGAN. I will choose freedom, also. I just want to mention to you, they are not exactly incompatible, and we ought to find a way to get everybody in the country together. Thank you very much.

Senator ERVIN. Thank you very much. I will say I agreed with you on many things on the Bill of Rights, but it just grieves me, and makes me wish to weep, for the great organization that stood for freedom of the individual, like the Civil Liberties Union, to come out and justify robbing all children, black and white, of their freedom.

Mr. MORGAN. Senator, at least, we agree on the first eight.

Senator ERVIN. The record will be held open for 10 days to receive any further statements that anybody may wish to insert. The subcommittee stands in recess.

[Whereupon, at 4:30 p.m., the subcommittee recessed subject to the call of the Chair.]

APPENDIX

STATEMENTS SUBMITTED BY MEMBERS OF CONGRESS

PREPARED STATEMENT BY HON. HOWARD H. BAKER, U.S. SENATOR FROM TENNESSEE

Mr. Chairman, I am grateful for this opportunity to present my views as the Subcommittee on Constitutional Rights continues its consideration of the question of the judicially-ordered busing of school children.

As a sponsor of several legislative proposals designed to relieve the hardships imposed by massive crosstown busing, I join my colleague from Tennessee, Senator Brock, the Chairman and ranking minority member of this Subcommittee, and many other members of the Senate in urging prompt action on this issue.

Although a number of pieces of legislation have been introduced in an attempt to bring about an equitable solution to this judicially-contrived situation, the critically important matter has not been dealt with conclusively.

To date, the legislative processs has produced no lasting remedy. Court-ordered busing continues in my home State of Tennessee in the cities of Nashville and Memphis and in other cities throughout the land.

I will continue to actively support legislation which I hope will prove effective in dealing with this problem. It seems very likely, however, that a long-term solution can best be achieved through a constitutional amendment.

There have been some attempts in the past to dismiss busing as a racial or regional issue, perennially put forth for its election-year appeal. Black and white parents and children from throughout the country who have personally experienced the continuing family disruption brought about by massive busing rightly dispute that claim.

A September, 1973, Gallup poll reported that although a majority of our citizens favor desegregated public school systems, only 5 percent support the use of busing.

This survey, taken at the beginning of the current school year, indicates that "much of the opposition to busing stems from reasons other than racial animosity. These include the belief that busing is an infringement of personal liberties, worry about busing children to schools in different neighborhoods, and concern that busing will increase local school taxes."

The National Congress of Parents and Teachers has expressed strong opposition to busing, and PTA organizations across the country have registered their support for proposed legislative solutions to the problem.

Delegates to the last PTA national convention adopted a resolution pledging that the organization would "reaffirm its strong commitment to integrated quality education for all children and * * * oppose the reassignment of students solely to achieve racial balance."

By now, it should be abundantly clear that to be against busing is not to be against providing a quality education for every child, black and white. To be against busing is to place a common-sense concern for orderly education above the caprice of transportation orders.

Legislation prohibiting the assignment of a child to a certain school because of his race is in keeping with the spirit of our historic advances in the progress of the civil rights struggle.

We must not turn our backs on our national commitment to a plural society and to desegregated public school systems. Rather, we must open our eyes to evaluate the effects of busing on children, their families, and their communities.

For thousands of Tennessee families, the problem of busing is not a hypothetical one. It is not something to be viewed on the news broadcasts or read about in the newspapers and then forgotten. It is, regrettably, a fact of life.

I can testify first-hand that many citizens of Nashville and Memphis who are dedicated to the purposes of civil rights strongly oppose massive busing. Some of the members of the community who spoke out most eloquently and forcefully against the evils of forced segregation are equally outspoken against the evils of forced busing.

In cities which have experienced court-ordered busing, there is now a general agreement that enormous hardships have been worked on the children involved, on their parents, and on the financial resources of the community—in that order of importance.

The dislocations of crosstown busing are especially grave because the burden falls hardest on the children themselves. They are the ones who are uprooted from their neighborhoods, forced to get up before daylight, and wait on street corners for buses to carry them past their neighborhood schools to unfamiliar destinations.

For local communities, busing orders have often meant that funds which could be used to make needed improvements in educational facilities or to provide better pay for teachers are instead spent to buy, fuel, and maintain buses. I believe that the current energy crisis and the resultant shortage of gasoline and increase in fuel prices makes unnecessary busing even more indefensible.

The theoretical benefits of busing are being increasingly questioned now that busing plans have been translated into reality. The hardships, frustrations, and dislocations are undeniable.

Because of the actual experience of Tennesseans and other citizens in localities which have had to deal with the problem of busing, I believe it is imperative that the proposed solutions receive the priority which they deserve.

I remain convinced that our national goals of providing a good education for every child and assuring equal educational opportunities for all are not furthered by the judicial mischief of busing.

PREPARED STATEMENT BY HON. DEWEY F. BARTLETT, U.S. SENATOR FROM OKLAHOMA

I appreciate the opportunity to appear before this distinguished committee to present my views concerning forced busing.

However, it disturbs me that these hearings are even necessary. Last April 10, I appeared before another judiciary subcommittee expressing these same views. Yet almost a year has passed and our Nation's metropolitan areas continue to have forced cross-town busing. A recent Gallup poll showed that only 5% of the American people support forced busing as a means to achieve integration in our public schools.

Only 5% of our people support forced busing yet Congress has refused to change our law.

This same Gallup poll showed that only 5% of our people oppose integration. Likewise, let me make it perfectly clear that I too am in favor of integration and believe that the Federal Government has a positive duty to help achieve this goal. But I do not believe that forced busing is an acceptable method to reach that end.

The issue of forced busing became a matter of great concern to many citizens of Oklahoma in the fall of 1969. At that time the first flood of forced busing opposition came to a head in Oklahoma City. As Governor of Oklahoma, I was expected to take a public position. I did not want to be wrong. As I stated, I morally believe in integration. The question was whether forced busing was a proper vehicle to achieve integration.

After much study, it became obvious to me that forced busing was an unjust, unworkable experiment, and not in the best interest of integration, education, or of people, generally. At that time, I issued a detailed statement which said in part:

"Busing, however, requires the school board and/or superintendent to discriminate against some students (of each race) attempting to eliminate the results of long-time discrimination. Discrimination to eliminate discrimination is indefensible and is a cure as sick as the disease itself."

Time has vindicated that conclusion.

Forced busing has created a state of social and educational chaos in Oklahoma's two largest cities, Tulsa and Oklahoma City. It is one issue on which there is little division. The vast majority of people, including Oklahomans, are opposed to busing and cannot understand why it has not been stopped.

I'm sure most of you are familiar with the studies which have been made in the forced busing experiment. David J. Armor, associate professor of sociology at Harvard, in an in-depth study of busing, concluded that "busing does not lead to significant, measurable gains in student achievement or interracial harmony. The available evidence thus indicates that busing is not an effective policy instrument for raising the achievement of black students or for increasing interracial harmony." And he continues: "The available evidence on busing then leads to two possible policy conclusions. One is that massive busing for purposes of improving student achievement and racial harmony is not effective and should not be adopted at this time. The other is that voluntary integration programs . . . should be continued and positively encouraged by substantial federal and state grants."

I have discussed forced busing with the superintendents of my State's two largest school systems. Both of these men are sensitive, intelligent human beings who desire excellence in education for blacks and whites. Both of these men have been in the trenches on busing. They have had to formulate and implement busing plans. And both are of the opinion that forced busing has failed.

Tulsa has implemented both voluntary and forced busing plans. The voluntary plan achieved success and public support. The forced plan has met widespread opposition and lack of acceptance from both blacks and whites. Since Tulsa implemented forced busing they have experienced a 37% decrease in school enrollment while the suburbs have increased by 11%.

Dr. Bill Lillard, superintendent of the Oklahoma City system stated that "public support for schools has been weakened and polarization has increased as a result of busing."

With the onset of the energy crisis the mass forced crosstown busing of school children has become more ludicrous. According to Dr. Lillard, the Oklahoma City schools will use an additional 350,460 gallons of gasoline this year due to forced busing. Yet even with those facts Congress refused to act.

Which brings me to why I am here. I have introduced S. J. Res. 47, a Constitutional amendment to prohibit the forced assignment of a child to a school on account of his color. The amendment is as follows: "No public school student shall be assigned, transferred, or otherwise compelled to attend any school on account of his race, color, creed, or national origin."

I know the committee is considering both constitutional amendments and legislation to prohibit forced busing. I support eliminating forced busing by both legislation and constitutional amendment. The former is more expeditious and easier to achieve, the latter is more sure.

The people are frustrated that government is not responsive to their will. A 1971 Gallop poll showed 77% national opposition to forced busing—with blacks split almost evenly.

This is one of several areas of legislative prerogative invaded and confiscated by the Supreme Court. Now is the time for Congress to exert its constitutional responsibilities to represent the people.

The amendment I have proposed will work. I suggest, gentlemen, this is why we are here: To represent the people. And the people do not want forced busing. Let us not let another year go by without listening to the people.

I appreciate the invitation to appear before this committee, and I will be happy to furnish any additional information.

PREPARED STATEMENT BY HON. ROBERT P. GRIFFIN, U.S. SENATOR FROM MICHIGAN

Mr. Chairman, thank you for the opportunity to present my views with respect to the several bills referred to this Committee (S. 179, S. 287, S. 619 and S. 1737) which seek to legislate an end to forced busing. As you know, I am the principal sponsor of S. 179, which is similar to a bill I first introduced during the 92nd Congress.

At the outset, I wish to associate myself generally with remarks made by the Chairman at the opening of these hearings. In particular, I share the Chairman's hope that the testimony taken during the course of these hearings will help the Congress to understand more clearly the urgent need for legislation which will truly insure "equal protection of the law" for America's school children.

I am not wedded only to the particular language of my own bill. I see some merit in each of the other measures that the Committee has under consideration.

Most important, after careful study, I believe Congress can, and should, bring an end through legislation to the arbitrary exercise of unfettered judicial discretion which has resulted in so much senseless busing based on race. Enactment of such legislation should be one of the most important objectives during this 2nd Session of the 93rd Congress.

My position is—and consistently has been—for equal rights and against discrimination. During my 18 years of service in Congress, I have had the opportunity to vote for every civil rights bill that has become law since Reconstruction Days following the Civil War.

As one who is keenly interest in making more and swifter progress toward the goal of a society without racial discrimination, I am deeply concerned that that tool of forced busing is counter-productive and is actually working against the very objective it is supposed to advance. Instead of helping in the effort to promote better race relations, it is resulting in more bitterness and more polarization.

The people of my own State of Michigan are almost unanimous in their opposition to court-ordered forced busing based on race. They are unanimous in their support of the goal of quality education for all children. But they are convinced that forced busing does more harm than good in the effort to achieve that goal.

Next week the Supreme Court will hear oral arguments in the Detroit busing case. For several years now, the people in that area have been living under the threat of a Federal judge's order which would force busing across the boundary lines of fifty-three different school districts in the metropolitan Detroit area.

It is hoped, of course, that the Supreme Court will refuse to uphold the extreme and far-reaching order of the district court. But an important point, so far as these hearings are concerned, is that the Supreme Court would find it much easier to reach that result if there were legislation—such as that under consideration—on the statute books.

The statutory proposal I have introduced as S. 179 provides in essence that "No court * * * shall have jurisdiction to * * * issue any order * * * to require that pupils be transported to or from school on the basis of their race, color, religion or national origin."

I submit that there is solid precedent for the statutory approach embodied in S. 179.

Article III of the Constitution clearly gives Congress power to determine the jurisdiction of lower federal courts and, except in certain cases, the jurisdiction of the Supreme Court as well.

At an earlier point in our history, when Congress concluded that federal courts were abusing their power to issue anti-union injunctions in labor disputes, the Norris-La Guardia Act was passed.

Of course, the Norris-LaGuardia Act does not deprive federal courts of all jurisdiction to deal with labor cases. It merely withdraws or limits court jurisdiction to employ one particular remedy—the injunction—which, in the opinion of Congress, was being abused. All other remedies otherwise available continue to be available to the courts in labor dispute cases.

In 1868, Congress even went so far as to withdraw jurisdiction from the Supreme Court to review writs of habeas corpus. This far-reaching exercise by Congress of its constitutional power to restrict jurisdiction was upheld by the Supreme Court in *Ex parte McCardle*.

It should be obvious that if the statutory approach I have proposed were enacted into law, federal courts would still be left with an abundance of reasonable tools and remedies to deal with situations of racial discrimination.

Only one remedy—busing—would *not* be available, the Congress having determined that it is unduly burdensome and unreasonable as a matter of public policy.

In final analysis, the statutory approach embodied in S. 179 is not only constitutional but, of course, it can be more readily enacted than could a Constitutional Amendment to curb busing.

In addition, this approach would provide the Supreme Court with a convenient, face-saving way out of a very difficult situation which it has itself created. By merely adhering to established precedents, the Court could get off the busing hook and find its way back to the solid, sensible ground staked out in *Brown vs. Board of Education:* that government at all levels should be color-blind.

I urge that the Committee move toward that goal by reporting favorably S. 179 to limit federal court jurisdiction with respect to busing.

PREPARED STATEMENT BY HON. WILLIAM V. ROTH, JR., U.S. SENATOR FROM DELAWARE

Mr. Chairman, I am unalterably opposed to busing as a means of bringing about racial balance in our school system just as I have been opposed in the past to busing to maintain segregated schools. If the intent of busing is to develop better understanding among the races and to promote harmony, it has failed.

Forced busing of our school children has brought about more conflicts among the races than any social experiment within recent memory. Our children should be able to go to school in the neighborhoods where they live. By having a school near a child's home, parents are able to participate and take a greater personal interest in the child's day-to-day activities through meetings with teachers, other parents, the school board, and the children themselves.

The child, too, can participate in after-school activities and thus develop a greater rapport with his peers, as well as developing friendships at home which are carried over into the classroom. The neighborhood school often becomes a center for community and cultural education. Adults use the school's facilities in the evening for classes, and thus the school becomes a center for the entire community, not just the children.

Obviously, people live in certain areas because those are the areas where they feel most comfortable. This may be determined by ethnic origin, economics, or just by choice of friends.

As an alternative to busing, I favor the development of first-rate, high-quality, neighborhood schools for all students, regardless of race. Massive busing costs taxpayers thousands of dollars and school children hours of time. An example of court ordered busing costs is in Jacksonville, Fla. where annual costs tripled to $3.6 million since 1971.

I am convinced that this money could be spent more wisely if it were used to hire more and better teachers and additional learning materials for the classrooms of disadvantaged pupils.

I commend this Subcommittee for holding these hearings in an effort to terminate, through statutory means, the practice of forced busing. During this period, vast numbers of additional schoolchildren may be forced to attend a school outside of their neighborhoods as a result of court decrees. I am pleased, therefore, that this matter is being seriously considered by your Subcommittee. Hopefully, these deliberations will cause appropriate legislation to be reported to the full Senate for its consideration.

I have supported the neighborhood school concept ever since I have been in Congress and will continue to do so as long as I am here. I would prefer that this matter be handled by legislation, however. As this appears not to be possible, I believe we should move forward with a constitutional amendment because, after all, this is a long slow process. Should subsequent events prove such an amendment unnecessary, nothing will have been lost.

PREPARED STATEMENT BY HON. JOHN C. STENNIS, U.S. SENATOR FROM MISSISSIPPI

Mr. Chairman and members of the Subcommittee, I welcome the opportunity to present my views as to S. 619, the Uniform Criteria Act of 1973. I am also interested in the other like bills before the Subcommittee but, as you know, I am a co-sponsor of S. 619.

Mr. Chairman, I am very happy to see these hearings taking place and I commend you and the members of the Subcommittee in holding them at this early date.

Mr. Chairman, the time for action on busing is here. People across the nation are totally opposed to this senseless activity.

Busing of students to schools out of their neighborhoods is extremely costly to educational agencies. They are spending for buses, fuel, tires, drivers and maintenance when they should be spending for teachers' salaries, laboratories, libraries and buildings.

It is unfortunate that small children are being subjected to the risks and dangers present on long bus rides without adequate adult supervision. Putting miles and miles between parents and their children in school leaves much to be desired.

Small children are bused from one area of town to another one year and to still another area the following year. School boards must constantly revise plans for desegregation. Valuable time is spent on this and plans for improving the quality of education take second place. Law suits are constantly filed against school boards for doing this year what was court ordered or HEW ordered last year. The public schools in our nation are on the brink of ruin and the people look to us for a remedy.

The cure, Mr. Chairman, lies in our returning to the neighborhood school concept. Therein lies the strength of our public schools. Allow students to transfer to any school they desire to transfer to but let's not force them to do so. Dual school systems have now been abolished, Mr. Chairman, now let's get on with improving the quality of education in those schools.

The courts must narrow their role in this matter to providing remedies for violations regarding specific situations where there is found to be a denial of equal protection of the laws.

Mr. Chairman, the only problem the courts should be concerned with is ending dual school systems. Changing patterns in the population and the changing in the ratio of white to black in any area, if any, are normal and should not be disturbed by the courts. Only purposeful actions taken by school boards to resegregate an area or school should be reviewed by the courts.

This week the United States Supreme Court will hear arguments regarding the crossing of boundary lines in Michigan to desegregate their school in Detroit. If school district boundary lines are not sacred, are county lines? Where will it all end, Mr. Chairman? I hope it will end here with us. We are the represeatatives of the people. The people have spoken. We are obligated to act—and act now.

I believe the four bills presently before the Committee are sound and that perhaps the best in all of them should be used to enact sound legislation to combat the busing system we now have.

Mr. Chairman, and members of the Subcommittee, I appreciate your giving me the opportunity to be heard in this very important matter. I hope we will soon put this matter to rest.

PREPARED STATEMENT BY HON. DONALD D. CLANCY, U.S. REPRESENTATIVE FROM OHIO

Mr. Chairman and Members of the Senate Subcommittee on Constitutional Rights, I am most grateful to have this opportunity to speak out in favor of these four bills—S. 619, S. 1373, S. 287 and S. 179—which would have the effect of preserving our community school systems.

Legislation such as this is necessary if we are to improve the quality of education in this nation. History has shown that the best schools are those where the school administrators, faculties and parents are united in the cause of educating children. If any one of those parties is eliminated, the capability of educating students is severely handicapped.

It is obvious how administrators and teachers are essential to the education process. It is not so obvious how the parents determine to a great degree the quality of education provided to their children. If parents insist on high quality education, if they are deeply interested and involved in the schools, they have it in their power to employ and direct administrators and teachers to provide high quality education. When parents have been disinterested, when the parent-teachers organizations have dissipated, then the quality of education has slipped.

Lately in this country, we have seen a trend to force—by government decree—a policy upon our school systems which would deprive them of the parental interest and participation which is so vital to high quality education. I refer, of course, to mandatory busing to achieve integration. We have seen instances where students ride a yellow bus for more than an hour to reach a school in a strange community, while buses in that same community are transporting children for an hour in the opposite direction. It is insane to contemplate such a situation. It defies common sense.

This policy has been instituted to the ironic approbation by the same persons who hailed the Supreme Court decision in 1954 of Brown vs. Topeka School Board. As you know, that case decreed that racially segregated public schools were unconstitutional. It, in effect, said that parents and students could choose, freely, the public school which they preferred to attend and they would not be hindered because of race. No one who believes in the constitutional guarantees of freedom and equality can conscientiously object to that, and I contend that it was a healthy ruling for high quality education in community schools.

But the people who exulted in that Supreme Court ruling were not satisfied and have gone to the other extreme. They now are demanding that school enrollments should be established according to race. They are insisting that a school with a predominant black enrollment shall take in a balance of white students, and that a predominantly white school shall enroll blacks.

They would achieve it by forced busing. The premise of forced busing is that races are not equal. The sole factor that determines busing is the color of a child's skin. Forced busing is state-sanctioned racism. This is government by decree and it contradicts the basic tenets of our democracy and republic.

It has resulted in a proposed amendment to our Constitution which I support, that "No public school student shall, because of his race, creed, or color, be assigned to or required to attend a particular school."

It is incomprehensible that these persons who are forcing busing upon us have not instead forced an equitable distribution of educational resources—which I believe we all could accept. It would be a good deal easier and cheaper to bring the educational resources to the community than to bring the students to the school. And, I might add, it would be more effective.

I sincerely believe that quality education would be destroyed by forced busing as now conceived. I believe this because I believe that busing, which takes students from their community to a strange and distant school, will destroy the community school systems which have served us so well. The first thing that is going to happen is that parents are no longer going to support the school in their home community because their children are not there. Neither will they support the school in the distance which their children attend. Primarily because of the great inconvenience, they are not going to attend the PTA meetings; they are not going to go to board meetings where proposed policies are debated; they are not going to question a principal or teacher's arbitrary regulations, whether just or unjust.

When a school situation becomes intolerable, they may not encourage, but they will be less insistent about discouraging absenteeism by their children. In short, their interest in and their control of the schools will be lost. Extra-curricular activities which are important to the experiences, education and pride of students, will suffer because of lack of participation and lack of support by the student body and parents.

This, the abolition of our community schools, is the strongest argument—on common sense, practical grounds—against forced busing. The mandatory imposition of busing, in itself, is the strongest argument on the constitutional grounds of guarantees of freedom of choice and equality. There are many other arguments which you have heard; like the high cost of busing, like the safety factors and like the distractions from education.

In America, we give all people the free choice of where to live, how to seek a livelihood, and what to do for recreation. I believe they should have a free choice for education for their children.

PREPARED STATEMENT BY LAWRENCE J. HOGAN, U.S. REPRESENTATIVE FROM MARYLAND

Mr. Chairman, on the first day of the 93rd Congress I introduced H.J. Res. 85 which calls for a constitutional amendment providing that "no public school student shall, because of his race, creed or color, be assigned to or required to attend a particular school".

In the first 14 months of this Congress there has been no willingness to bring this issue out of Committee upon the floor of the House. This is certainly contrary to the wishes of the majority of the House. As evidence of this fact was the vote, 221 to 192, of the House on December 13, 1973 on an amendment to prohibit excessive busing in connection with energy legislation. A discharge petition with bipartisian support is called for. This we now have. I encourage my colleagues to join with me in signing.

Let me review what has happened since court ordered racial balanced busing has come to Maryland. I represent the school system which has been faced with the largest court ordered racial balanced busing in the Country to date. This is the Prince Georges County Schools, the 10th largest in the nation, which were ordered on January 29, 1973 to establish maximum and minimum black-white figures of school attendance in each of the 235 schools which it operated. This court-ordered busing was appealed up to the Supreme Court, but the court decisions have all been unfavorable. The only answer to a reversal lies in action by the Congress.

School busing is a big business. The state of Maryland which has a school budget of approximately $1 billion uses over 4% of that amount for transportation. The Prince Georges County schools which undoubtedly have one of the largest, if not the largest, busing fleet in the world—813 buses—spend $7 million annually for busing (Metro has 105). It was estimated that the racial balanced busing which was ordered in January 1973 resulted in increased gasoline consumption of 30-40%. Presently the schools open earlier and close later than the other systems in Maryland which means that the buses are used the greater part of the school day. Since Prince Georges County is eight times the size of the District of Columbia and 45 miles from one end to the other, the buses travel greater distances and make a greater number of stops for racial balanced busing.

I have always strongly opposed busing because it is illogical and because the neighborhood school provided better education. The parents, black and white, overwhelmingly support them. My most recent poll showed 88% opposed to busing. In the year that has transpired since our busing order went into effect virtually all of the defects of such busing have come to pass without any of the real achievements which we sought. School population has decreased substantially because of the flight of youngsters to private schools and out of the County. And this is in spite of the fact that Prince Georges County is one of the fastest growing counties in the country. Vastly increased security has been necessary. Special classes for disruptive students have been organized. There was the tragic death of a young black youngster in a busing accident.

Now with the energy crisis, the question is being asked—Why are we busing so much and wasting so much fuel. Our busing fleet in Prince Georges County is eight times the size of public mass transit which provides service throughout the County and in and out of the District. If the fleet were expanded to the required size for "normal" school hours, it would be nearly 1200 vehicles which begins to approach the size of our present Metro fleet for the entire metropolitan Washington area. In these critical times it certainly appears that there should be a re-evaluation of our school busing requirements.

Although I have applauded the orderly manner in which the Prince Georges County citizens obeyed the busing order and sought to overturn it through the legal process, I have from the outset recognized that legislative action in this area is needed.

It is now thirteen months since Judge Kaufman's order was implemented on virtually 30 days notice. One could ask what has been accomplished in that period.

There have been some obvious and concrete results of the busing order of Judge Kaufman.

(1) School hours now start as early as 7:30 a.m. and conclude as late as 4:30 p.m. This means that with busing mothers can have their children at the bus stops shortly after 6:30 a.m. or as late as 5:30 p.m. Mothers with children at several levels need much patience in meeting the new and varied bus time. Daylight saving time has caused several changes in even this drastic scheduling.

(2) At least 12,000 additional students were bused for the first time. The order added approximately 60 buses so that the Prince Georges County school bus fleet now totals over 800, one of the largest if not the largest in the world.

(3) Gasoline consumption for the additional buses certainly does not help the energy crisis. Gasoline consumption has increased probably 30 to 40 percent. School buses because of start/stop operations get only five to five and a half miles per gallon of gas.

(4) School attendance for the fall session is down 2,300 under the estimate. The estimate is well under the 161,000 peak school attendance of a couple years ago. In one of the fastest growing counties in the nation, private and church schools are gaining and public schools are losing students.

(5) Disciplinary problems are manifold as evidenced by the request of the Prince George's County Schools for "alternative educational programs for disruptive students". The increased cost is indicated as $296,000 annually. The security staff of the schools has required an addition of 13 positions.

(6) One four year old youngster being bused for racial balance from Palmer Park to New Carrollton has been killed in a bus accident. It was a tragic commentary on Judge Kaufman's order that the individual was a member of a minority group, so young, and the accident so unnecessary.

(7) Results of spring educational tests have been made public. The lead sentence in publicity concerning the tests was "Prince Georges County public school students continued to decline in learning ability, but showed moderate improvement over previous years in achievement . . . only two grades scored above the national average. . . ." This is hardly quality education.

(8) The outlook is for substantial readjustments of school busing for racial balance. As predicted, minority growth has resulted in the need to reschedule under Judge Kaufman's formula twice a year.

(9) The legal fight was costly. Under a provision of the Civil Rights Act the attorneys for the plaintiffs received $68,000 in fees. They had asked for $117,000. The principal attorney was a professor at the University of Maryland Law School which is under the Maryland State Superintendent of Schools as is the Prince George's County school system. The attorneys acted in behalf of the American Civil Liberties Union and the National Association for the Advancement of Colored People. The provision of attorney fees, at least to a paid employee of the school system, would appear to be an unfair burden on the taxpayer.

If the experience of the Prince Georges County schools is to be perpetuated and expanded over this nation I know that its citizens will realize that the benefits are negligible and the costs substantial. Today when people are fighting at the gas pumps for gasoline to take them to work, they are not happy to see hundreds of school buses with plenty of gasoline carrying their children across the County.

PREPARED STATEMENT BY HON. LUCIEN N. NEDZI, U.S. REPRESENTATIVE FROM MICHIGAN

Mr. NEDZI. Mr. Chairman, I am deeply opposed to the busing of schoolchildren away from their neighborhood schools in pursuit of racial balance.

In my judgment, such busing plans are shortsighted, highly divisive, and lacking in educational, legal, and political good sense.

This week the U.S. Supreme Court heard perhaps the most important and potentially far-reaching busing case of all, Bradley *v.* Milliken, Michigan cross-district busing controversy.

Hopefully, the Court will rule against cross-district busing and busing in pursuit of racial balance and put an end to much of the controversy once and for all.

However, if the Court supports District Judge Roth's order the only effective alternative is a constitutional amendment.

There are a number of proposed constitutional amendments already introduced in the House and Senate. A suitable constitutional vehicle can certainly be found among them.

In questionnaire surveys I have taken among my constituents, an overwhelming number favored a constitutional amendment to stop busing if the Supreme Court fails to overturn the Roth decision. In this year's questionnaire, for example, 86.6% favored such an amendment, only 10.2% were opposed, and 3.2% were undecided.

Sober and thoughtful citizens from all walks of life have thought this issue through. In Michigan, they strongly oppose what is an unprecedented judicial scheme which would daily bus hundreds of thousands of schoolchildren in a vast metropolitan area. At least 53 different school districts would be involved.

If this judicial decree is upheld for Michigan its implications for every urban-suburban area in every State are obvious.

II

During the early stages of this controversy, some proponents of busing urged that the imposition of racial quotas in each and every school would have good educational consequences. When scholarly research and informal evidence failed to support this view, the argument was gradually abandoned.

The operative phrase then became "desegregation." In essence, however, the Roth order still demands a quota system, "racial balance," and the massive, disruptive busing of students and transfer of teachers.

A sound public policy for education should seek to rally good will and public opinion for quality schools. Such supports inevitably must rely on the personal and political commitment of parents, teachers, students, and legislators.

Many of us said from the beginning, and events have borne us out, that court-mandated busing for racial balance would squander that precious good will, aggravate racial antagonisms, and damage education generally.

III

Cross-district busing, in my judgment, would place intolerable burdens on children, parents, and teachers. It would, moreover, tamper with the legitimate expectations of tens of thousands of education-minded families who saved to buy or rent a home in a particular neighborhood near a particular school. No wonder they are dismayed when they hear of schemes to have their children needlessly bused to distant out-of-neighborhood and out-of-county schools.

IV

It would be a mistake for people to get trapped into responding to a symbol, to feel obliged to follow a position because it is labeled "liberal" or "conservative." Nonsense is nonsense whether proposed by liberals or conservatives.

In the course of the past seven years the Detroit metropolitan area has suffered the equivalent of two natural disasters. The first was the riot of 1967, the Nation's most costly in lives and property. The second was the HUD scandal which saddled the area with around 20,000 foreclosures and the awful debris of thousands of vandalized and abandoned properties. Cross-district busing would be the equivalent of a third great natural disaster. Government should avoid, not abet, such catastrophies.

V

American history reveals that the remedy of enacting a constitutional amendment is not taken lightly. But there are occasions when it becomes necessary.

If the U.S. Supreme Court does not stop cross-district busing and busing for racial balance, a constitutional amendment will be very much in order. And the appropriate congressional machinery must be ready to act.

PREPARED STATEMENT BY HON. M. GENE SNYDER, U.S. REPRESENTATIVE FROM THE FOURTH DISTRICT OF KENTUCKY

Mr. Chairman, gentlemen of the subcommittee, it is a privilege for me to have the opportunity to express myself in unwavering support of the Senate bills which are the subject of these hearings before the Subcommittee on Constitutional Rights. On January 31st of this year, I introduced companion bills to each of these measures in the House of Representatives. I appreciate being able to present my views to the distinguished Members of this Subcommittee and of the full Senate Committee on the Judiciary.

THE AMERICAN DILEMMA: EVER-CHANGING FORCED-BUSING FOREVER?

Every American citizen is directly affected by the forced-busing issue, if only through his pocketbook. The increasing costs of this "solution" to so-called racial discrimination in American public schools are felt not only by citizens of affected counties, cities and states who must come up with the cost of additional buses, fuel, maintenance, insurance, etc., etc., but by everyone else. All Americans in our fifty states must bear the tax burden to support the growing army of bureaucrats in the U.S. Department of Health, Education and Welfare, U.S. Department of Justice, U.S. Civil Rights Commission, etc., who are involved with all aspects of planning, reviewing, overseeing, and policing busing and other "desegregation" procedures, to say nothing of the entire U.S. judiciary system which seemingly has implanted itself forever in the midst of this unending dilemma.

Much of that dilemma lies within the judicial branch itself, unfortunately. Let me explain.

The Supreme Court on April 20, 1971 rendered its decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*. Regarding the subject of racial quotas, the Court said this:

"If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.

The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

The Court further declared:

"In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system which still practices segregation by law."

The Supreme Court in concluding the case, said:

"At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems will then be 'unitary' in the sense required by our decisions in *Green* and *Alexander*.

"It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary."

Nevertheless, in the Fourth District of Kentucky which I represent, as well as in the adjoining Third District, forced-busing may soon be the order of the day because a Circuit Court seemingly does not wish to abide by the language of the Supreme Court just quoted. The Sixth Circuit Court in Cincinnati evidently does not want to allow a single all black school, though the Supreme Court ostensibly would. Nor does it seem to accept the fact of population mobility, as the Supreme Court does. And it seems to opt for continuing court-ordered plans to handle future changes in racial ratios as a result of that mobility, which it would interpret as ipso facto discrimination, despite the Supreme Court's declaration that such continued adjustments are not required. Yet precedent shows us that such contradictions may remain in effect.

All this, I submit is ample proof of a continuing, unending dilemma.

I repeat, unending dilemma. I believe it deserves even greater attention than it has received for the following reasons:

It is of the utmost importance to realize first, that lower courts are requiring much more idealistic and impractical standards than the Supreme Court itself, and second, despite this, the highest court is letting them stand.

In at least one case the Supreme Court has let stand the fixing of racial ratios in every school in the system despite its above quoted Swann position that it "would be obliged to reverse" such a requirement by a district judge.

The Prince Georges County, Maryland school system is presently burdened by the fiat of a Federal judge in Baltimore, Judge Frank Kaufman of the U.S. District Court of Maryland. His ruling of December 29, 1972, upheld by the Fourth Circuit Court but unreviewed by the Supreme Court, requires that no school in that system shall be more than 50 percent black, nor less than 10 percent black, regardless of the population make-up surrounding those schools, regardless of what busing is required to engineer those percentages in all schools in that 45 mile wide county. This requirement is totally out of line with the Supreme Court's statement in *Swann* that it would have to reverse a district court requirement of "any particular degree of racial balance or mixing." Despite this, the Supreme Court refused to review the Kaufman decision on October 16, 1973.

Who can know what any Federal court, including the Supreme Court, really means at any given time, or may hold on the same matter in the future, with such examples of contradiction and confusion among the "wise men" of our judiciary system?

It is against this confused, contradictory background that I wish to look into the busing situation in my own State of Kentucky.

That the problem of forced-busing could interminably extend into the future, I believe is clearly brought out by the decision of the Sixth Circuit Court of Appeals which on December 28, 1973 overturned the March 8, 1973 decisions of the U.S. District Court for Western Kentucky. In those March decisions, District Judge James F. Gordon, after extensively reviewing the desegregation measures taken by both the Louisville School Board and the Jefferson County School

Board, found both systems to be unitary and whatever concentration of either white or black children in any school remained, to be clearly the result of defacto, and not dejure causes. These reasons he found chiefly to be what he called "white flight," taking place all the while desegregation efforts, including busing, were being implemented. He found those efforts to be completely satisfactory, in compliance with the Supreme Court mandates.

I quote the following three sentences in the Circuit Court's opinion to make two points that demonstrate that the dilemma which faces us is one without end unless Congress sensibly puts an end to it:

"All vestiges of state-imposed segregation have not been eliminated so long as Newburg remains an all black school. Where a school district has not yet fully converted to a unitary system, the validity of its actions must be judged according to whether they hinder or further the process of school desegregation. The School Board is required to take affirmative action not only to eliminate the effects of the past but also to bar future discrimination. *Green, supra*, 391 U.S. 438 n. 4."

The first point is an immediately apparent contradiction—with the Cincinnati Court setting its own standard in defiance of the position of the highest tribunal in the land. The Supreme Court, as we have seen in *Swann*, said:

"It should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system which still practices segregation by law."

Yet the Sixth Circuit Court in its wisdom declared:

"All vestiges of state-imposed segregation have not been eliminated so long as Newburg remains an all black school."

The Supreme Court would allow some one-race schools. The lower Circuit Court, despite this, would allow none! Incredible!

What are the American people in fifty states, not just in Kentucky, to believe judicial standards on school desegregation really are?

The second point I wish to highlight is much more subtle, but not unimportant, as long as the Supreme Court refused to even review Judge Kaufman's Prince Georges County busing order which established a universal school racial ratio despite the highest court's earlier dictum in *Swann* that it would be obliged to reverse such ratios if imposed, and its specific declaration opposing any mandatory racial composition "for every school in every community."

The Circuit Court referred to *Green* to support the last of the three sentences I quoted:

"The School Board is required to take affirmative action not only to eliminate the effects of the past but also to bar future discrimination."

In that Supreme Court decision, *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), one finds at the bottom of page 438, note 4, which reads:

"We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. *Louisiana* v. *United States*, 380 U.S. 145, 154".

In *Louisiana*, perhaps not as the Supreme Court intended it, but, I fear, as the Circuit Court interpreted it, lies the seed of the problem that I call "busing forever," despite *Swann's* ruling out in 1971 continuing follow-up decrees adjusting racial composition of student bodies.

I think we can begin to see the germination of this seed in the Sixth Circuit Court's decision. Technically speaking, perhaps the Circuit Court did not broaden the Supreme Court's original 1964 language in *Louisiana* (which it utilized by way of *Green*), but interestingly, it made no reference to the initial desegregation decree that the highest court specifically mentioned. Thus it can be read:

"The School Board is required to take affirmative action . . . to bar future discrimination."

In *Louisiana*, the Supreme Court spoke of the duty to bar future discrimination in an initial order ending past segregation in the schools. And as I have pointed out, in *Swann* there is the specific declaration that year-by-year follow-up adjustments of racial balance in schools are not required since, as a result of a satisfactory initial decree, "at some point" a system would be "unitary," with "racial discrimination through official action . . . eliminated from the system," and future population changes of themselves would not alter that unitariness.

The Sixth Circuit Court, however, seems to imply that follow-up decrees are required. It might even be said that its own decision reversing Judge Gordon is a "follow-up" decree for this reason:

District Judge Gordon found "white flight" to be a defacto cause of any continued racial "imbalance" in certain schools in Metropolitan Louisville despite thorough desegregation efforts by the authorities. He specifically found no dejure causes due to any continued official vestiges of racial segregation.

The Circuit Court seems to have refused to accept the actuality of this population mobility—cited by the Supreme Court in *Swann* as the reason making follow-up racial adjustments unnecessary—as a defacto cause of the racial imbalance it found, ruling that imbalance entirely due to dejure causes which Judge Gordon found absent completely.

One can certainly question the implication in the Circuit Court's language that a school board must prevent future discrimination by successive adjustments when that court does not seem to accept the fact of society's mobility inescapably leading to varying racial ratios all the time, a fact the Supreme Court did accept in *Swann*. But as Prince Georges County found out to its dismay, the Supreme Court does not always stand by its own rulings. So one is justified in asking, just what is the position of the courts as to continuing adjustments of racial ratios in our schools?

The two examples I have presented here—the Supreme Court's refusal to review a lower court's mandating of a compulsory racial ratio in an entire school system despite the highest tribunal's previous dictum that it would be obliged to reverse such an order, and the Sixth Circuit Court's clear defiance of one Supreme Court desegregation standard and its broadening of another—support my contention that forced-busing is here to stay unless Congress puts an end to it.

Forced busing is here to stay, as a never-ending, court-ordered, court-reviewed, and court-reordered phenomenon in American life, unless Congress acts to terminate it by way of a Constitutional Amendment, or by way of the statutory legislation embodied in the bills before this Senate Subcommittee and in the bills I have introduced in the House of Representatives.

But it is not just forced-busing that is here to stay, but ever-changing forced-busing. The problem is not just busing forever, but ever-changing forced-busing forever!

The reason for this is apparent from the position of the Circuit Court in Cincinnati. As population changes develop among races as they have in Louisville and Jefferson County and elsewhere, and the racial balance automatically changes in neighborhood schools with new enrollments and departures, the courts can claim as time passes that racial "imbalance" exists anew, and on the grounds of this "evidence" of renewed "discrimination," order and reorder, over and over again, the school boards of the nation to draw up and implement new guidelines, new attendance zones, new busing schedules, etc. for the same or different school districts and/or counties or cities, for the same or for different students, at the same or different schools.

And all this on an unending basis—unless the Federal courts also go into the business of controlling where the American people can move to or not move to!

No further amplification on my part is necessary for everyone to see what may lie in store for this country—disruption unlimited! But the greatest disruption will be imposed on the lives of our tenderest citizens, the young students in elementary and secondary schools. Parents will not know from one term to the next what schools their children will be in, or what hours they will have to keep to make their bus schedules.

In the cases involving Louisville and Jefferson County, Kentucky, the Sixth Circuit Court refused to accept as effective the desegregation measures found to be very satisfactory by the District Court. The only way to satisfy the higher court is to have increased forced-busing that involves leapfrogging, or cross-busing. I completely agree with the sensible opinion on that very point that District Judge Gordon stated in his decision, now reversed:

"We have closely scrutinized the situation at the Newburg school and the adjoining elementary schools and the Cane Run school about which plaintiffs complain. We have seen the efforts by the school board in these areas and the use of permissible tools employed by the Board and we reject as totally unrealistic the contentions of the plaintiffs that it is necessary, in order to comply with constitutional mandate, to transport white children into the Newburg area from adjoining districts, and at the same time transport some of the Newburg children who live near the school to white schools, thus cross-busing or leap-frogging these children merely in order to achieve some sort of racial balance, absent dejure acts or failure to act by the authorities." *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky* (p. 32)

This finding by the District Judge gets to the very heart of the issue. Is forced-busing to be a permanent sociological tool (without regard for human feelings) utilized to reach and maintain throughout never ending population shifts, some idealistic but impractical form of racial balance based purely on preconceived, arbitrary percentages?

This evidently is what the Sixth Circuit Court wants—and yet it is a well-known fact that roughly twenty-five percent of the American people move every year!

I submit, if the view of the Sixth Circuit Court prevails—and I've already shown the Supreme Court does not always overturn lower court decisions that defy its own—this country will be put through fantastically costly, unending contortions and disruptions, involving not so much our school children's education, as where they will get it, unless the Congress acts favorably on the bills before this Subcommittee.

If left standing, the Circuit Court's decision in effect holds that school boards for all time must revise busing plans—no matter how often changes must be made in any or all aspects of their plans and operations—to keep up with changing population trends, on the specious grounds that racial balances in schools differing from some preconceived, court-set percentages will, ipso facto, prove dejure segregation and discrimination.

As cities expand, and people of both races move farther from midcity areas, forced-busing could require longer and longer trips. Earlier departures, and later arrivals home involve greater dangers for our school children, as many have pointed out. Walking to, waiting for, and riding on, school buses by many more children, will involve more time away from home. Leapfrogging forced-busing likely will become even more of a disrupting factor than it has been to date.

FORCED-BUSING LARGELY BASED ON ERRONEOUS SOCIAL THEORY

Federal court decisions in the area of race relations since the early 1950's have been based on the speculative theories and assumptions of certain sociologists. Among these was Gunnar Myrdal of Sweden, whose book, "An American Dilemma," was cited in the Supreme Court's historic decision in *Brown* v. *Board of Education of Topeka* in 1954.

Now we have a new American Dilemma.

It is ridiculous and tyrannical for our Federal courts, which are totally unrepresentative and unanswerable to the American people, to impose and perpetuate an untenable sociological pattern of costly forced-busing on our people largely on the basis of social theories and assumptions now proven to have been erroneous!

The courts have the responsibility of adjudication on the basis of law, not sociology. The Supreme Court's function largely has been the determination of constitutionality of our laws. It has no power under the Constitution to determine the validity of social theory. Law under the Constitution is the guide for our courts, not the disproven—nor unproven—concepts of foreign or domestic social theoreticians, no matter how well-intentioned they may be.

Millions of dollars have been expended on voluntary and mandatory busing in the North, South, East and West as a direct result of court decisions heavily influenced by social theories now shown to have been incorrect.

One outstanding survey demonstrating the falsity of the theories selected by the courts was that reported by David J. Armor, Associate Professor of Sociology at Harvard, in the quarterly journal, THE PUBLIC INTEREST for Summer, 1972.

Professor Armor has this to say of the implications of his findings on busing: "It is obvious that the findings of integration research programs have serious implications for policy. . . . The most serious question is raised for mandatory busing (or induced integration) programs. If the justification for mandatory busing is based upon an integration policy model like the one we have tested here, then that justification has to be called into question. The data do not support the model on most counts." (p. 114)

As Armor predicted ("it is likely that in some quarters the data we have presented will be attacked on moral or methodological grounds and then summarily ignored") his findings have been criticized and ignored. (But he devastated his critics in his surrebuttal, "The Double Double Standard: a Reply" in the Winter, 1973 issue of THE PUBLIC INTEREST.)

A careful reading shows him to be eminently fair, in my opinion. For example, he states (p. 115), "Although the data may fail to support mandatory busing as it is currently justified, these findings should not be used to halt voluntary busing programs." He urges more support for continued voluntary busing, but flatly declares, "massive mandatory busing for purposes of improving student achievement and interracial harmony is not effective and should not be adopted at this time." (p. 115)

My position essentially is that States and local communities have the right to determine their own methods of improving race relations in schools and the standard of education for both blacks and whites as long as officially imposed segregation is ended. Federal fiat that claims to be juridical but is merely sociological, has no place in this area. Armor and others have now demonstrated the unsoundness of Federal court sociology, and it must be discarded. Inasmuch as the courts show no inclination to shed their social hypotheses, the Congress under Article III of the Constitution must step in and strip away the juridical abuse of the courts—their basing judgments on illusions. The elected representatives of the people in both Houses of Congress know the people would support such action. Only one in twenty Americans supports busing as a satisfactory integration tool, according to a nationwide Gallup Poll taken in early August, 1973. The National Parents and Teachers Association in its National Congress, on May 22, 1973 resolved, "That the National PTA oppose the reassignment of students solely to achieve racial balance in the schools."

The American people know what the courts won't face up to, that busing is a failure. Armor asked the question, "Why has the integration policy model failed to be supported by the evidence on four out of five counts? How can a set of almost axiomatic relationships, supported by years of social science research, be so far off the mark?" (p. 111) He gives three answers, but my point here is that the people—unlike the courts—know that forced-busing as a solution is far off the mark!

Armor blames "(1) inadequate research designs, (2) induced versus 'natural' factors, and (3) changing conditions in the black cultural climate," for the errors of the sociological concepts which were chosen by the courts to underlie their decisions involving busing.

SPECIFIC FINDINGS OF THE ARMOR STUDY

Professor Armor stated at the outset of his essay in THE PUBLIC INTEREST:

"The policy model behind the Supreme Court's 1954 reasoning—and behind the beliefs of the liberal public today—was based in part on social science research. But that research did not derive from the conditions of induced racial integration as it is being carried out today. These earlier research designs were 'ex post facto'—i.e., comparisons were made between persons already integrated and individuals in segregated environments. Since the integration experience occured *before* the studies, any inferences about the effects of *induced* integration, based on such evidence, have been speculative at best. With the development of a variety of school integration programs across the country there arose the opportunity to conduct realistic tests of the integration policy model that did not suffer this limitation. While it may have other shortcomings, this research suffers neither the artificial constraints of the laboratory nor the causal ambiguity of the cross-sectional survey. The intent of this essay is to explore some of this new research and to interpret the findings." (p. 91)

Armor's study was chiefly based upon the busing experience of school children in grades one through twelve over a period of from one to five years in five geographical areas: Boston, Massachusetts; Ann Arbor, Michigan; Hartford, Connecticut; Riverside, California; and White Plains, New York.

Professor Armor, at the outset of his article, indicted "educational policy makers" for deliberately ignoring a key finding of sociologist James Coleman, author of the "Coleman Report" in 1966 which was the product of a survey by the U.S. Office of Education commissioned by Congress as part of the Civil Rights Act of 1964.

Armor presented his case in these words:

"The Coleman study, however, also reported some findings that surprisingly were not in accord with the early model. For one thing, black children were already nearly as far behind white children in academic performance in the *first* grade as they were in later grades. This raised some question about whether school policies alone could eliminate black/white inequalities. Adding to the significance of this finding were the facts that black and white schools could not be shown to differ markedly in facilities or services, and that whatever differences there were could not be used to explain the disparities in black and white student achievement. This led Coleman to conclude that 'schools bring little influence to bear on a child's achievement that is independent of his background and general social context; and this very lack of an independent effect means that the inequalities imposed on children by their home, neighborhood, and peer environment are carried along to become the inequalities (of their adult life).'

"While the findings about segregation and black/white differences have been widely publicized and largely accepted, this concluding aspect of Coleman's findings has been ignored by educational policy makers. Part of the reason may derive from the methodological controversies which surrounded these findings (e.g., Bowles and Levin, 1968), but the more likely and important reason is that the implications were devastating to the rationale of the educational establishment in its heavy investment in school rehabilitative programs for the culturally deprived; the connection between public policy and social science does have its limitations." (p. 94)

Professor Armor carefully delineated his survey (p. 96) as relating only to forced, not natural, school integration, and not the "effects of integration on adults, nor on the effects of other types of integration, such as neighborhood housing, employment, and other forms." He stressed this limitation:

"*We are specifically interested in those aspects of the model that postulate positive effects of school integration for black students; namely, that school integration enhances black achievement, aspirations, self-esteem, race relations, and opportunities for higher education* . . . In other words, *we will be assessing the effects of induced school integration via busing*, and not necessarily the effects of integration brought about by the voluntary actions of individual families that move to integrated neighborhoods."

Armor catalogued his findings specifically. He stated (p. 98)

"To test the integration policy model we can group our findings under five major headings—the effects of busing and integration on: (1) academic achievement; (2) aspirations; (3) self-concept; (4) race relations; and (5) educational opportunities . . . In each case, we shall compare bused students with the control groups [students of similar backgrounds not bused] to assess those changes that might be uniquely associated with the effects of induced integration."

Accordingly, Armor set forth his findings under those headings. I can only quote them in the briefest manner as follows:

"Achievement

"None of the studies were able to demonstrate conclusively that integration has had an effect on academic achievement as measured by standardized tests." (p. 99) "The integration policy model predicted that achievement should improve as black students are moved from segregated schools to integrated schools . . . But four of the five studies we reviewed (as well as the Berkeley and Evanston data discussed in footnote 4) showed no significant gains in achievement scores; the other study had mixed results. Our own analyses of the Coleman data were consistent with these findings (see Armor, 1972)." (p. 109)

"Aspiration and Self-concept

"In the [Boston] METCO study we found that there were no increases in educational or occupational aspiration levels for bused students; on the contrary, there was a significant decline for the bused students, from 74 percent wanting a college degree in 1968 to 60 percent by May 1970 . . . At the very least, we can conclude that the bused students do not improve their aspirations for college." (p. 101) "The integration policy model predicted that integration should raise black aspirations. Again, our studies reveal no evidence for such an effect." (p. 110)

"In the METCO study we also found some important differences with respect to academic self-concept. The students were asked to rate how bright they were in comparison to their classmates. While there were some changes in both the bused and control groups, the important differences are the gaps between the bused students and controls at each time period. The smallest difference is 15 percentage points in 1970, with the control students having the higher academic self-concept. Again, this finding makes sense if we recall that the academic performance of the bused students falls considerably when they move from the black community to the white suburbs. In rating their intellectual ability, the bused students may simply be reflecting the harder competition in suburban schools." (p. 102)

"Race Relations

"One of the central sociological hypotheses in the integration policy model is that integration should reduce racial stereotypes, increase tolerance, and generally improve race relations. Needless to say, we were quite surprised when our data failed to verify this axiom. Our surprise was increased substantially when we discovered that, in fact, the converse appears to be true. The data suggest that, under the circumstances obtaining in these studies, integration heightens racial identity and consciousness, enhances ideologies that promote racial segregation, and reduces opportunities for actual contact between the races." (p. 102)

"The integration policy model predicted that race relations should improve as the result of interracial contact provided by integration programs. In this regard the effect of integration programs seems the opposite of that predicted. It appears that integration increases racial identity and solidarity over the short run and, at least in the case of black students, leads to increasing desires for separatism. These effects are observed for a variety of indicators: attitudes about integration and black power; attitudes towards whites; and contact with whites. The trends are clearest for older students (particularly the METCO high school students), but similar indications are present in the elementary school studies as well. This pattern holds true for whites also, insofar as their support for the integration program decreases and their own-race preferences increase as contact increases." (p. 110)

Thus, in the first four of Armor's categories we see that he found few positive, but many adverse effects, as a result of what he called "induced school integration via busing."

In the fifth category—"Long-term Education Effects"—he stated his finding that a higher percentage of bused black students did *start* college than un-bused control students, but this was based on two studies surveying a total of less than 150 students, and of which he said: "Neither of these studies is large enough, of course, to draw any definite conclusions." And, he had already pointed out (as quoted above under "Aspiration and Self-concept") that there was already a much higher aspiration to go to college among bused students at the outset of their busing than among the control group—although those aspirations declined markedly as that busing continued. Armor said (p. 101), "In this respect, some educators have hypothesized that integration has a *positive* effect in lowering aspirations to more realistic levels; of course, others would argue that any lowering of aspirations is undesirable."

Sure enough, Armor's critics claimed that lowering of aspirations was a positive effect! We find a separate category devoted to it in their critique of his study:

"Shifts in aspirations and 'academic self-image' during desegregation are positive in meaning."

I quote briefly from this section:

"Katz (1967), for example, has demonstrated experimentally how unduly high aspirations can doom black students to serious learning difficulties. In his view, desegregation benefits learning among black children by lowering their aspirations to more effective and realistic levels. . . . In short, when desegregation lowers rigidly high aspirations of black students to moderate, effective levels, it should be considered a positive, not a negative effect." ("Busing: a Review of 'The Evidence'" by Thomas F. Pettigrew, Elizabeth L. Useem, Clarence Normand & Marshall S. Smith, in THE PUBLIC INTEREST, Winter, 1973, p. 107–108)

For the life of me, I can not understand why forced-busing must be resorted to achieve this so-called "positive" effect. Could not teachers counsel black students to this end in their own neighborhood schools if it were warranted? Why subject Negro children to the embarrassment and chagrin of having to learn such a "lesson" by being forced to "achieve" alongside white students who already are considerably ahead of them, to say nothing of the time they must spend on school buses. I see no value whatsoever in a program of any kind that reduces a student's desire to better himself, and for any educator to call this a "positive" benefit is sheer nonsense. Even where a student clearly does not have the ability to handle college work, he should be encouraged to better himself in other ways.

Professor Armor, as I have mentioned earlier, answered his critics in what he called, "The Double Double Standard: a Reply." In this reply he further emphasized the fact that ***with induced school integration via busing, black students fell farther behind their fellow white students in reading achievement.*** He set forth in detail statistics from Evanston, Illinois, Berkeley, California, Sacramento, California, New York City, and from Hartford and New Haven in Connecticut, that showed the reading gap between black and white students grew, rather than diminished. Regarding this particular set of findings and criticism of his original survey, Armor said:

> "The argument of Pettigrew and his colleagues that perhaps white students also gain in achievement from the integration experience per se demands close scrutiny. While it makes sense to argue that black students might gain by being in a classroom environment with higher-achieving white students (the so-called "peer" effect prominent in the Coleman study), it makes no sense at all to argue that white students will gain by being in a classroom environment with lower-achieving black students. What mechanism could possibly be operating that produces opposite peer effects for the two groups? It seems to me that my critics' reasoning is getting fuzzy here.
>
> "One of the main points of my study was to show that black achievement is not being helped in any significant way by busing, and that therefore we have to raise the possibility of harmful psychological effects due to the achievement gap. The small gain of two months for the paired black students in New York is little consolation for their being placed in an environmental where they must complete for grades with students three years ahead of them in academic growth. The authors [his critics] completely ignore this issue throughout their critique." (THE PUBLIC INTEREST, Winter 1973, p. 123)

If are really concerned for the welfare and advancement of our black children, I suggest we pay heed to what Professor Armor said of the possibility of harmful psychological effects upon them due to this achievement gap.

I have gone into the Armor study at some length to demonstrate factual support, based on actual experience, for the bills before this Subcommittee.

DISPUTED SOCIAL STUDIES POOR BASES FOR LAW

For the same purpose, ironically, perhaps as important as Professor Armor's findings were, is the very fact that since publication, they have been disputed—just as his factual conclusions were at odds with the theories and findings of others before him, like Gunnar Myrdal.

Could anything more clearly demonstrate the utter absurdity of the Federal courts of the land—or any courts for that matter—basing their decisions on sociological theories, than this continued conflict between socioligists? One set of assumptions, theories and projected conclusions continue at odds with other sets. "Research findings" turn out later, under actual conditions, to have been erroneous because of the inadequate standards and misconceptions by and on which they were formulated and forecast.

THE PUBLIC INTEREST itself cast a bit of scholarly light on this conflict among sociologists which further emphasizes the foolishness of a court relying on any given set of one-sided sociological data.

A member of the Publication Committee of THE PUBLIC INTEREST, Professor James Q. Wilson, in the same Winter, 1973 issue of that journal, wrote a short three page commentary entitled, "On Pettigrew and Armor: an Afterword," which every Member of Congress could read with profit. Professor Wilson is Chairman of the Department of Government at Harvard University.

I quote some of his most pertinent remarks, beginning with his opening sentence on page 132:

> "Those who have read David Armor's 'The Evidence on Busing' and now find in this issue a lengthy rebuttal by Thomas Pettigrew and colleagues and a surrebuttal by Armor might be forgiven for throwing up their hands in despair at the apparent inability of social science to give clear and simple answers to important questions . . .
>
> "Because of these considerations, and after having looked at the results of countless social science evaluations of public policy programs, I have formulated two general laws which cover all cases with which I am familiar:
>
>> First Law: All policy interventions in social problems produce the intended effect—*if* the research is carried out by those implementing the policy or their friends.
>>
>> Second Law: No policy intervention in social problems produces the intended effect—*if* the research is carried out by independent third parties, especially those skeptical of the policy.

"These laws may strike the reader as a bit cynical, but they are not meant to be. Rarely does anyone deliberately fudge the results of a study to conform to pre-existing opinions. What is frequently done is to apply very different standards of evidence and method. Studies that conform to the First Law will accept an agency's own data about what it is doing and with what effect; adopt a time frame (long or short) that maximizes the probability of observing the desired effect; and minimize the search for other variables that might account for the effect observed. Studies that conform to the Second Law will gather data independently of the agency; adopt a short time frame that either minimizes the chance for the desired effect to appear or, if it does appear, permits one to argue that the results are 'temporary' and probably due to the operation of the 'Hawthorne Effect' (i.e., the reaction of the subjects to the fact that they are part of an experiment); and maximize the search for other variables that might explain the effects observed.

"People will naturally disagree over whether a given policy evaluation by a social scientist supports either the First Law or the Second Law. Many considerations prevent that argument from being carried on very intelligently—the loyalties and commitments of the scholars involved, the efforts of partisans and polemicists to defend one interpretation absolutely and to reject the other entirely, the defensiveness of whatever government agency is being praised or blamed by the study in question, and the tendency of human affairs to be so complex and ambiguous as to make the possibility of designing and executing a Decisive Experiment all but impossible."

These few remarks of Professor James Q. Wilson are so cogent, so revealing, and so pertinent to the matter before us, that they need no further comment on my part. Let me say only that nowhere have I seen a finer argument for a return to simple common sense in deciding the great issues that face the country, including the dilemma brought about by court-ordered forced-busing.

In my opinion, Prof. Wilson in a few sentences has demolished the value of the Supreme Court's citing of any sociological work for the purpose of supporting its desegregation or any other decisions. He has rendered worthless all argument for continued forced-busing on the grounds of sociological concepts, without diminishing the ultimate positive accomplishments of social research.

CONCLUSION

In concentrating on the points presented in my testimony before this Subcommittee, I have not underscored the better-known arguments against forced-busing on grounds of the widespread disruption it causes. In no way have I meant to leave the impression that such disruption is anything but very great in the lives of those directly affected by this juridical imposition which violates the very right of individual choice in our supposedly free country.

Beyond the added tax burden on parents and others that I have mentioned is the deprivation of children of much of their free time. There is the added danger they are exposed to because of the very nature of busing. A penalty of time and worry is imposed on parents.

Home life is disrupted by virtue of the added hours a family is kept apart while children are waiting for and riding buses to distant schools, when they could walk or ride to neighborhood schools.

One of the greatest penalties imposed upon children who must be bused under court orders, is their being deprived of the possibility of engaging in extracurricular activities. The buses must leave on time, and can't wait for individual students involved in after-school sports, band practice, music lessons, dramatics and the like. Parents' schedules, or incomes, or their responsibilities to their other children make it impossible in many cases for them to drive to distant schools to pick up their children who otherwise could profit from such activities. In such cases, forced-busing amounts to a virtual prohibition against extracurricular activities. Not only individual students and families are thus penalized, but so are the very schools themselves!

Similarly, the very distances involved impose a heavy burden of time and money on parents who must attend conferences with their children's teachers, and PTA meetings. In many cases parents simply cannot attend these functions so important to the education of their children.

Quality education and educational progress itself is tremendously disrupted by the appalling sacrifice to the idol of integration by way of compulsory busing that is the draining of tight funds away from school facilities, equipment, teachers' salaries, etc. by insatiable transportation demands.

I have not dwelt on the derogation of our children to the status of mere guinea pigs in a vast social experiment, and their treatment, whether black or white, as mere numbers.

These are some of the reasons a growing number of American citizens are up in arms over the issue of forced-busing. We represent the people. It is our job to take effective action to end the dilemma the Federal courts have brought about by their social engineering.

Forced-busing is a failure in practice, proving that the theories underlying court mandates for it were totally unrealistic. Ordinary common sense and experience have proven it to nineteen of every twenty Americans.

The courts err when they base jurisprudence on erroneous sociology. They cannot as easily err in determining the intent of the Congress as to the laws it enacts together with the President's signature. The will of the Congress—which represents the American people—must stand supreme, as long as it is Constitutional, and not any pet social theory of the moment, which time and experience may bring crashing down on the rock of reality.

Millions of Americans who have never given a thought to forced-busing of school children, are today complaining of having to live on daylight saving time because of the energy crisis, with the resulting inconvenience of getting up in the dark to go to work. They also are complaining of getting up in the dark just to get in line early at service stations to get gasoline. Let them think, while they dress and while they wait in the dark, of the thousands upon thousands of young black and white children who are, and who will be, forced to get up in the dark the greater part of their entire school lives to catch buses just to satisfy the sociological whims of our courts, when they could leave home much later to go to the neighborhood schools nearby.

We must face the permanence of the busing problem that lies before us unless we in the Congress act to do away with the dilemma entirely. An unending court requirement of our school boards to revise school attendance plans and disrupt lives anew by ever-changing forced-busing, can only bring harm to our children and our educational system. *The plaintiffs in the Louisville and Jefferson County cases made no charges as to the quality of education black children receive, complaining only of racial mix in the schools.* Yet the sacrifice of student time and tax funds that must be made to meet court-ordered racial ratios by forced-busing involving leapfrogging of whites past blacks, and blacks past whites in school buses using vast amounts of fuel, can only diminish the quality, effectiveness and practicality of education children of both races could receive. It is totally counter-productive! Let us put an end to it by enacting the measures before this Subcommittee as soon as possible. The only way to get the Federal Courts off this "kick" and out of their obviously erroneous stance of deciding these forced-busing cases on sociological concepts, is to take their jurisdiction to decide such cases from them.

PREPARED STATEMENT BY HON. JOHN TOWER, U.S. SENATOR FROM THE STATE OF TEXAS

Mr. Chairman: I would like to begin my statement here today by expressing my most sincere appreciation to you and our distinguished colleague from Florida (Mr. Gurney) for your continuing interest and concern for the Constitutional rights of our nation's school children.

I know that we all share the strong conviction that our main concern should and must be the *quality* of our educational system. I am personally convinced that the social planners in our society have lost sight of that goal in their concern over numbers and quotas. The American people have overwhelmingly rejected the policy of forced busing to achieve numerical balance of minority representation in our nation's classrooms. Responsible spokesmen for America's minority communities have scoffed at the attitudes of these social planners, for their actions contradict their words.

Roy Innis of the Congress of Racial Equality argues that forced integration of the public schools places blacks in a "perpetual minority". Similarly, the delegates to the 1972 National Black Convention in Gary, Indiana, adopted a strong plank opposing busing of black children to achieve racial balance, condemning "forced racial integration of the schools as a bankrupt, suicidal method of desegregating schools," and William Raspberry, a nationally syndicated black columnist candidly stated on March 6, 1973 that:

"It has long seemed insane to me for black people to pursue whites from this neighborhood to that and clear out of the county because of some unspoken belief that black children could not get a proper education in the absence of white children.

"It strikes me as educationally unsound, psychologically damaging to black children, and tactically disastrous . . ."

Mr. Chairman, I simply cannot understand the rationalization used to equate the freedom and equality guaranteed by our *Constitution* and the arbitrary dictates of the social planners and courts. In my mind the two remain incompatible.

In 1954, the Supreme Court, in a landmark decision of this century ruled unconstitutional state laws which mandated segregation, emphasizing the feeling of inferiority that black children suffer when they are legally prohibited from attending white schools. I doubt there is an individual in this room who would question that this decision was an eminently fair and accurate interpretation of our *Constitution*. In 1971, however, the effect of the *Brown I* decision was vitiated by the *Swann* decision which launched an era of reverse discrimination.

Let us review the facts for a moment. The object of busing in the words of its proponents, and as enunciated in the *Swann* decision, was to *surround* Negro children with white culture and white schoolmates, on the theory that such *enforced* association would: (1) improve learning skills; (2) raise achievement horizons; and (3) smooth out racial antagonisms. This so-called "contact" theory was a sociological creation more or less invented without any significant research data to support it.

After several years of experience with extensive busing, however, research studies indicate that in case after case the results of forced busing have been psychologically harmful rather than beneficial, the gap between black and white achievement has grow even larger after busing, and that it has been a source of racial friction rather than amity.

Since it is in alleged pursuit of these goals that busing has been promoted in all the cities studied, at enormous cost in dollars spent and disruption of the affected communities, I feel a re-examination of the policy is long overdue.

Until such an objective re-examination is initiated, and while it is being conducted, it is equally important that we make an effort to offset the ill effects which appear to be indicated.

Before you today for consideration are four measures which I feel are quite compatible with this objective. I shall briefly discuss three of these bills which I am co-sponsoring.

The first, S. 179, introduced by the distinguished Senator from Michigan (Mr. Griffin) would limit the jurisdiction of Federal courts to issue any further order requiring the transportation of students to achieve racial balance.

Furthermore, it would prohibit any department, agency, officer or employee of the United States empowered to extend Federal financial assistance to schools, from withholding or threatening to withhold such assistance in order to coerce or induce the implementation or continuation of any desegregation plan which requires the forced transportation of students to achieve numerical quotas. Finally, this measure would establish a procedure for an expeditious determination in any case involving a question of the validity or applicability of the preceeding sections of this act.

S. 619, "The Uniform Criteria Act", introduced by the distinguished Senator from Alabama (Mr. Allen) would provide statutory criteria for the formulation of judicial remedies under the discretionary equity powers of the Federal court judges.

Finally, S. 1737, the "Student Freedom of Choice Act" introduced by the distinguished Chairman of this subcommittee (Mr. Ervin) would prohibit any official of the Federal government from withholding or threatening to withhold Federal financial assistance from a public school operating under a freedom of choice plan on account of student body racial composition in an effort to coerce the transportation or transfer of students or faculty from one public school to another.

This proposal further prohibits any United States court from ordering a change in the racial composition of any public school operating under a freedom of choice plan, requiring the transportation of students from one school to another, or denying any student the right to attend the public school of his choice.

Mr. Chairman, I am convinced that these proposals are consistent with the guarantees of individual freedom contained in the *Constitution of the United States*, and urge that they be favorably reported, either individually or in the form of an omnibus measure containing the significant provisions of each.

Thank you very much.

ADDITIONAL STATEMENTS SUBMITTED

PREPARED STATEMENT BY MRS. OMEDA J. BREWER, CHAIRMAN, WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION

Mr. Chairman, members of the Judiciary Committee, thank you for the opportunity to submit this report to the Subcommittee on a subject of great importance to our school system and school systems in other parts of the nation facing impossible situations.

My name is Mrs. Omeda J. Brewer and I am Chairman of the Board of Education of the Winston-Salem/Forsyth County School System. I have been an elected member of the Board since 1970 and its Chairman since December, 1973.

The Winston-Salem/Forsyth County School System is one of the largest school districts in the nation under Federal Court orders requiring total pupil integration. To my knowledge, it is the only school district in the nation ever to be invited by a Federal Court to reduce the amount of cross-busing ordered previously by that same Court and, after complying by submitting a new plan to reduce the amount of cross-busing, the plan was rejected by the same Court. It is, to put it bluntly, a school district in which considerable confusion exists as to what the Constitution of the United States requires and what the Federal Courts will accept with respect to pupil assignment.

My purpose is to present to this Subcommittee a factual summary of the situation now existing in our school district, in the hope of facilitating your deliberations. To the maximum extent possible, I shall attempt to serve as a representative of our Board; nevertheless, it should be pointed out that each member of our Board has his or her own personal opinions on the various aspects of this complex question. Every member of our present board, however, has gone on record as opposing cross-busing for the sole purpose of integrating our schools.

Our Board, our administrative and teaching staff and countless volunteers have worked hard during the last two and one-half years to implement the present pupil assignment plan and to work within its structure in the best manner possible for the sake of all pupils. Everyone, including students and parents, has worked extremely hard to make the best of a very difficult situation. We have been fortunate in the cooperation received from everyone involved and, through this cooperation, we have escaped the violence that resulted in other places. However, the manner in which people have responded cannot be interpreted as acceptance or resignation to existing conditions.

We have created citizens advisory committees in each of our schools, held special meetings involving all races to create a better understanding of people and have used and stressed Human Relations courses in our schools. In spite of these efforts, the measurable results have not been decidedly positive. Neither can I answer affirmatively that the massive cross-busing that is now existing has achieved the educational progress which its proponents and the courts believed it would achieve.

I, along with the other Board members, teachers and parents, was extremely disturbed when the results of the Achievement Test Scores were released each year. Prior to 1971, (the year our school system began cross-busing) our third grade students scored at the National Norms level in Reading and Arithmetic Computation. Beginning in 1971, there was a drastic downward plunge to a low of 4 months below the National Norms. The Achievement Test Scores indicate our sixth grade students are 6 months below the National Norm. Our ninth grade students have dropped to a low of 1 year, 5 months below National Norms in Reading, and 2 years below National Norms in Math Computation. During this time, the average I.Q. at each of these grade levels are above the National average.

There are possibly many other factors that should be considered in connection with student performance. However, I can only conclude that our good faith efforts have not improved the performance of our students. It is becoming more evident to me that attitudes of students, teachers and parents have a direct effect on this lack of performance. Our local newspaper recently conducted a poll of students in our high schools and the summation of the prevailing opinion of those students was that "Integration implemented by busing has lowered standards to the level of students behind in learning and has resulted in the decline in scoring of Forsyth County students taking the Metropolitan Achievement Test for the past three years." Whether these expressed concerns are real, or imaginary, the fact remains this is the attitude of many of our students and it fails to accomplish what had been expected by the proponents of cross-busing and the courts which was better race relations.

There are other significant educational disadvantages in our school system's present structure. It has been necessary to use buildings not designed for the grade levels assigned to them. Stability is lacking in that students attend five different schools in different areas of the county during the course of their education, and many times they are required to travel a great distance from their neighborhood. Black and white parents, some with children in four or five different schools at the same time, show less support for their schools. Some schools are greatly overcrowded while others have empty classrooms. This exists today even though our enrollment in each school was within its capacity when our present plan was implemented only two and one-half years ago. As the housing pattern changes it changes the enrollment in our schools. Adjustments are difficult and often unrealistic due to the fact that to correct a situation in one school it will affect feeder patterns and may involve as many as six, eight or ten schools.

This year we implemented the first phase of our Public Kindergarten Program and, again, we were hindered by our present assignment plan and cross-busing. Five-year-old children are being bused out of the inner city to the outer rim of the county. Three times as many five-year-olds will be bused as we implement our total kindergarten program during the next two years.

Daylight Saving Time presented an unbearable problem for us. The first week, 26,000 students went to school in total darkness. Within three days we had two children injured and several bus accidents, due to the darkness. We immediately delayed the opening of school by one hour (which already was operating on a staggered schedule). Our regular opening schedule began at some schools at 8:00 a.m. and at intervals of 15 minutes with the last grade level, junior high schools, opening at 9:30 a.m. With DST, the junior high schools do not begin until as late as 10:30 a.m. and close at 4:30 p.m. with children arriving home at 5:30 p.m. and, in some instances, even later. The one-hour delay that we felt was absolutely necessary for the safety of our children, was the cause of great confusion and concern for working parents who have to leave small children at home unattended and for hundreds of working students working after school, either as part of our school program or in some instances because of necessity. Buses are also on all major highways during the peak afternoon and late evening traffic.

School Boards everywhere are faced with a multitude of problems that can only be dealt with and solved if School Boards are given the freedom to meet the needs that are often unique to their particular system. As Chairman of the Board of Education, my principal problem goes beyond these matters. It is a crisis of public confidence in the ability of local, state and national government to deal fairly and uniformly with an issue of major importance to the future of public education. This crisis of confidence is compounded by confusion and uncertainty as to what the Federal Courts actually require in the realm of public integration, as to the intent of Congress and as to the distinctions between school systems in the south and school systems in the north.

I would like to outline a chronology of developments that have added to the confusion and uncertainly in our own school district and further eroded the base of public support which we desperately need to improve our educational program.

The Winston-Salem/Forsyth County School System, the second largest in North Carolina, is a consolidated school district with an enrollment of approximately 46,000 pupils. The systemwide ratio of black pupils to white pupils is approximately 30 percent, and most of the black pupils live within the city limits of Winston-Salem.

Prior to 1968, the school district had not been involved in desegregation litigation. The school system had consistently adhered to guidelines set up by the Department of Health, Education and Welfare, pursuant to the Civil Rights Act. HEW representatives visited the school system and approved its pupil assignment plan and attendance area maps on every occasion until a lawsuit was filed against the system in 1968.

The present pupil assignment plan under which the district is operating was ordered by the U.S. District Court for the Middle District of North Carolina as a result of one of the two desegregation suits filed against the Board: *Catherine Scott et al* v. *Winston-Salem/Forsyth County Board of Education*. Following the decision of the U.S. Supreme Court in *Swann* v. *the Charlotte/Mecklenburg Board of Education*, the Court of Appeals for the Fourth Circuit, on June 10, 1971, remanded the *Scott* case to the U.S. District Court with instructions to obtain from our Board a revised pupil assignment plan.

The District Court told the Board that: "Despite the substantial difference between the findings of this Court . . . and the findings which form the predicate of the decision of the District Court in *Swann*, it is apparent that it is as 'practicable' to desegregate all the public schools in the Winston-Salem/Forsyth County System as in the Charlotte/Mecklenburg System and that the appellate courts will accept no less. Consequently, this Court can approve no less . . ."

Acting in good faith, the Board developed a plan for submission to the Court. The Board unanimously advised the Court that, although "this is the least expensive, least disruptive, least burdensome and most equitable plan the Board has been able to devise and still accomplish the required objectives of achieving a racial balance in the public schools of Forsyth County which will be acceptable to the Court, it is not a sound or desirable plan, and should not be required because the residential pattern of Forsyth County makes the accomplishment of such objective impossible without massive, expensive busing which imposes an otherwise unnecessary financial burden on the public and a tremendous burden of inconvenience and time consumption on pupils and parents, and traffic hazard on pupils . . ."

On July 26, 1971, the District Court ordered the plan into effect. It resulted in approximately racial balance in every school in our school district. The plan, in the opinion of the Court, was neither more nor less than was required by the law.

On August 31, in response to a request from the Board for a stay, the Chief Justice of the United States handed down an in-chambers commentary that, while denying the stay, suggested that the District Court had required something that was indeed more than the Constitution required. It is my understanding that copies of this ten-page opinion were dispatched to every District and Circuit Judge in the United States.

The Board asked the District Court to vacate its order, in view of the Chief Justice's statement. Meanwhile, the plan was implemented at the start of the 1971–72 school year.

On October 4, less than six weeks after the start of the school year, the Board's Counsel received a letter from the District Court saying that the Court had become "increasingly concerned about the children being bused on the Interstate" (Interstate Highway 40) and adding that there was serious question as to whether the Court "should continue to require implementation of a plan that involves busing so many children on this Highway." The Board replied that it needed more definitive guidelines as there were many four-lane (and even two-lane) highways that were very dangerous.

On December 3, the District Court issued a lengthy memorandum order which cited the school system's numerous good faith attempts to comply with relevant court decisions and stated that it was clear, "by any standards, that the Board of Education is now operating a unitary system." In a sharp criticism of cross-busing, the Court said, "The fact that the practice of 'cross-busing' existed to achieve segregation in dual school systems prior to *Brown*—and was condemned in *Brown*—does nothing to support its validity now." The Board was given the opportunity to submit a revised assignment plan for the 1972–73 school year, a plan which "need not result in any particular degree of racial mix in any school in the system." However, the Court reminded the Board that its previous assignment plan for 1970–71 was not accepted on appeal and that "adequate consideration" should be given to busing and split zoning.

The Board submitted a revised plan that would halt cross-busing of elementary school children except for voluntary majority-to-minority transfers. This revised plan was rejected by the District Court and later by the Court of Appeals.

Under the present plan, a total of 32,000 pupils are being bused—or approximately two-thirds of the pupils in the system. Several thousands of our pupils are being transported greater distances and over more heavily traveled roads and highways than would otherwise be the case. The school system operated 216 buses in 1970 and 276 the following year when eight schools were clustered and paired upon orders from the Court. The implementation of the present plan would have required 314 additional buses if the schools were to operate on the same opening and closing schedules and 157 additional buses were needed if opening and closing times were to be staggered. With local tax funds for the purchase of new buses severely limited and without the necessary time to order and receive the buses if money had been available, the Board had to "make do" with a total of 366 buses—including more than 100 vehicles that were 12 or more years old and "borrowed" from other school districts' discards. These buses are presently making 720 trips daily. Prior to cross-busing, the total bus mileage per day was 11,000 miles—today the buses travel 22,000 miles daily or nearly 4 million miles each school year. The total transportation cost this school year will exceed $1.4 million as compared to $502,000 prior to cross-busing. Our local system is responsible for the initial purchase of school buses and for salary supplements for adult bus drivers. Because of the limited number of buses, the opening and closing schedule for our junior high schools is totally unrealistic and educationally unsound. An additional 65 to 70 buses will be necessary to correct this situation. Additional adult drivers would also be necessary and both at the expense of our school system.

While the burdensome cost of the present assignment plan was a factor in the Board's judgment that it is neither sound nor desirable, it was by no means the only factor, or even the principal factor. The Board is also concerned with the distance traveled by our students (up to 46 miles for some) and the amount of time spent by pupils involved in cross-busing (up to approximately three hours per day in some instances, and an average of an hour and 20 minutes throughout the system), and the Board is concerned with the traffic hazards that are inevitable in the transportation of 32,000 pupils.

Because of the geographic size (about 600 square miles) and residential patterns of the school district, it is necessary under the present pupil assignment plan to transport several thousand pupils daily on four-lane expressways including Interstate Highway 40, U.S. Highway 52, and U.S. Highway 421. Under the present plan, loaded school buses travel more than 1,000 miles per day on high speed highways at a speed limited by State law to 35 M.P.H. The risk of tragic accidents are very real on limited-access expressways with slow moving buses traveling where high speed traffic exists.

We are all aware of the energy crisis including the acute gasoline shortage that is being experienced here in Forsyth County as well as throughout the Nation. The problem is becoming more serious each day. Working people are having great difficulty in getting gas to go to and from their jobs. Volunteers who have assisted our schools in so many ways are finding it more difficult to obtain the gas to go to the schools to serve. While cross-busing is not a national problem, it is very real and has become even more distasteful to our citizens when they see 366 buses making 720 trips daily (powered by gasoline) while they (the people) are waiting in lines at service stations for an hour or longer to be told the limit purchase is $2.00 or "we are out of gas." An added frustration is the need for our school system to operate activity buses (also requiring gasoline) after school hours in order to continue any athletic or after-school activity. Before cross-busing, students were able to walk home or provide their own transportation (with schools closer to their homes).

Needless to say, the outcry of the people in Forsyth County is becoming louder and louder and it is understandable they feel little desire to cooperate with our national leaders in their plea for conserving energy when they witness every day such a great waste of energy.

Mr. Chairman and members of the Committee, on behalf of the people of Forsyth County and on behalf of the Winston-Salem/Forsyth County Board of Education, I respectfully urge you to do whatever is required to end the seemingly endless confusion and uncertainty over what constitutes a "unitary" school system in these United States of America. More important, Mr. Chairman, I urge you to free our 46,000 children who are serving an unjust sentence for something no one has been able to define. The future of our nation depends upon the education we provide for our children and our children are being denied this heritage.

Thank you for allowing me to submit this report for your record.

PREPARED STATEMENT BY MRS. MARYANN DORIN, PRESIDENT OF THE LINDEN, N.J. OPEN ENROLLMENT AND NEIGHBORHOOD SCHOOL COMMITTEE

Mr. Chairman, members of the committee, I am Mrs. Maryann Dorin, President of the Linden, N.J. Open Enrollment and Neighborhood School Committee comprising some 1,200 members who are opposed to the forced movement of children within local school districts, between nearby school districts as well as the movement of children outside of school districts anywhere in the State. We advocate neighborhood schools with the endorsement of open enrollment on the principle of voluntary transfer with parental consent.

We will attempt to show you at this public hearing at least three areas in which we are concerned with forced movement of children or forced regionalization and they are: (1) the parental viewpoint; (2) the taxpayer's viewpoint; and (3) the children themselves with regard to their health, education and welfare. After all, common sense dictates that we the parent, oversee all education; we the taxpayer pay for it; and last but not least, our child is the product of both.

1. PARENTAL VIEWPOINT

It is the belief of our committee that education, like charity, begins at home and it is a known fact, especially with all the controversy busing has brought about, that noted psychologists and educators all over the country have confirmed this belief. Whether a noted psychologist or just a parent, we know that the first seven years predominates the education that a child gets for the rest of his or her life. Even Hitler in his attempt to provide the Third Reich with an absolute genius of species maintained that "let me have your child for the first six years and then you can have him back—he will be mine forever". So, now the parent cries: "Do not take my child away. It is my child at birth and we begin the greatest part of his teaching for now and forever". We now fight to keep that right—and I make note that this is not a local, state or national right, but rather a Divine right given us as our responsibility to see that he receives the proper upbringing and education. For the government to mandatorily move our children, do we not then have a taking away of our right? Yet we are bound to abide by the Constitution that says "men have certain inalienable rights." The government has the responsibility to provide our child with an education in the best manner—and to ascertain that the neighborhood concept which has built the country to what it boasts of as the greatest nation in the world—to determine that this is unconstitutional, unworthy, or any other adjective that may be derived, is preposterous.

To conclude the portion on parental viewpoint, we feel safe in assuming that all members of the U.S. Congress now know of the 50 states that have formed organizations such as ours firmly against the forced movement of children and forced regionalization of school districts and that, this in itself, clearly emphasizes the concern of parents about their children and about the way in which the government purports to educate them. We parents do not want to overstep our boundaries; however, we don't want the government to overstep theirs.

2. TAXPAYER'S VIEWPOINT

We come to the citizen who is a homeowner and has either already provided the education of his children by public, parochial or private school and feels that his job is over. We also meet the fixed income groups (or retirees) who may or may not have had any children to educate and we say "how do you feel about moving the children throughout school districts?" His first thought will be "how much"? Education has never gone down in price and even though it has always increased, and many times by a great percentage point, no one has ever cried not to pay for it because of the end product of its use. So, too, the taxpayer knows this and has accepted this burden throughout the years. We wish to point out that these retirees, these "finally finished" people are never finished paying for every other person's child's education because we are bound by law to provide this necessity. We are very much in favor of equalizing opportunities for education and educational costs; however, not at an added expense to the taxpayer for a service he doesn't even want. Capital expenditures are being left at the present rate—what about new buildings; and how will we handle changes to old ones? Again, the taxpayer will be left to guess at this until the time comes for him to merely PAY FOR IT.

The additional burden of cost resulting from the forced transportation of children away from their neighborhood schools, will certainly increase the burden of taxation that is necessary for a proper education for our children. New Jersey has already had its own case of increased costs to the taxpayer with no benefit derived as shown in the city of Plainfield. In a state court case (*Booker* vs. *Plainfield Bd. of Education*) the court ruled that Plainfield institute a busing program to achieve racial balance. After ten years of using this program, the imbalance still exists because of people moving in and out of the city, and the taxpayer has now paid a cost of roughly $500,000 per year for something that has never been achieved.

3. CHILD'S H.E.W. VIEWPOINT

There isn't a parent, taxpayer or educator alive that doesn't want the best for our children. We have already listened to educators who have been in the school systems for 25 years and better conclude that New Jersey ranks in the top ten in elementary and secondary education and boasts of this accomplishment. On the other hand, we are also well versed with the fact that higher education in New Jersey ranks as low as 48th out of 50th. It is true that the state has undertaken to try and remedy this situation and it is noteworthy to us that in many instances the State Colleges endorse the "open enrollment" policy to students and that this is accepted by our Commissioner and State Board of Education; however, on the secondary and elementary education levels, this same policy, although accepted, is frowned upon. The cost of the child's health, education and welfare still rests with his parents—whether it be a cost in worry or a cost in dollars. Weather factors regarding his health; extra-curricular activities regarding his education, and percentages of accidents are ours with which to deal.

This is why we oppose his riding anywhere else to school but rather prefer his walking to his own neighborhood school. The law of averages tells us that the more vehicles on the road, the greater the chance for an accident.

In closing, I would like at this time to tell you that as far back as April of 1970, Linden City Council went on public record opposed to regionalization and consolidation of school districts within the state. I am attaching a copy of this resolution. We of Linden are proud that when the voice of the people sounded our municipal government took heed and remembered *VOX-POPULI-VOX-DEIX*. For these reasons as outlined in this statement, we of O.E.N.S. in Linden strongly recommend the Congress take action and provide legislation remedies so badly needed throughout this Country to stop forced transportation of our children away from their neighborhoods unnecessarily.

Attachment—Linden City Council Resolution against Regionalization and Consolidation.

A RESOLUTION OPPOSING THE REGIONALIZATION AND CONSOLIDATION IN THE SCHOOL DISTRICTS OF THE STATE OF NEW JERSEY

Whereas, the New Jersey State Committee to Study the Regionalization and Consolidation of School Districts has issued a report referred to as the Mancuso Report, designated as such after its Chairman, Mrs. Ruth Mancuso; and

Whereas, said report recommends substantial changes in the boundaries of school districts which will exceed city lines and county lines where necessary; and

Whereas, there are additional recommendations that will not serve the best interests of the educational system in the City of Linden: Now, therefore, be it

Resolved by the Council of the City of Linden, That the Governing Body hereby expresses its opposition to the proposed Regionalization and Consolidation in the School Districts of the State of New Jersey; and be it further

Resolved, That copies of this resolution be forwarded to State Commissioner of Education C. Marburger, and the Senators and Assemblymen representing Union County in the Legislature of the State of New Jersey.

Passed: April 21, 1970.

Approved: April 22, 1970.

PREPARED STATEMENT BY M. STANTON EVANS, CHAIRMAN, AMERICAN CONSERVATIVE UNION

"BUSING, THE FINAL FAILURE"

It is impossible to understand the practice of busing without first understanding the general history of education in this country and the failure of conventional educationist formulae.

That busing is unpopular with the vast majority of the American people is apparent enough from the usual surveys of public opinion. Less widely known is the fact that busing is a desperate effort to salvage something from the debris of educationist failure—and that it is itself a failure of rather awesome proportions. When we add the fact that busing has laid a groundwork of authoritarian assumptions about the schools and the American family, the case for opposing this disruptive practice becomes conclusive.

For the past few decades, the dominant view on public schooling has equated proper education with increasing outlays of money. We have been told that "quality" is chiefly a matter of money for teachers, facilities, counselors, special aids, smaller pupil-teacher ratios, and the like, and it is for this reason that the traditional system of locally funded schools is alleged to be improper. Under this system, it is said, we have rich schools and poor ones, with suburban whites enjoying luxurious diggings in the good-rich schools and ghetto blacks being downtrodden in the poor ones.

In obeyance to such notions we have witnessed a steady campaign to enlarge school expenditures, cut down on pupil-teacher ratios, project compensatory programs for inner city children, and more recently to convert the funding of schools from local property taxes to higher and more equalizing jurisdictions. All of this activity has proceeded on the assumption that educational outputs could be improved by more and better funding for disadvantaged schools.

In the past few years, however, a considerable body of evidence has accumulated suggesting these conventional notions of educational progress are badly in error. The net conclusion emerging from this evidence is that larger infusions of money haven't upgraded the quality of education, and in particular haven't conferred appreciable benefit on Negro children of the inner city. In many jurisdictions, indeed, the trend is just the other way.

The story begins with the so-called Coleman Report of 1966, a survey commissioned by the Department of Health, Education, and Welfare under the Civil Rights Act of 1964 and headed by Prof. James Coleman of Johns Hopkins University. Stated purpose of this analysis was to measure "equality of educational opportunity" in the United States and one supposes, given the auspices, that the sponsors expected the normal run of liberal assumptions about the schools to receive empirical verification. If so, the sponsors must have been astonished at what they had wrought.

Instead of finding huge inequalities of educational product derived from inequalities of inputs, the Coleman analysts discovered, pretty generally, the reverse: To the surprise of all and sundry, their researchers suggested differences in expenditure, pupil-teacher ratios, and physical facilities had almost no correlation to the quality of educational achievement. In particular, there seemed no observable nexus between physical measures of "quality" schooling and the classroom performance of Negro pupils who entered school with educational deficits and got further behind in succeeding years.

The authors did their best to find some confirmation for liberal educationist views, but the results were marginal indeed. When all was said and done, the major findings were that the nation's schools "are remarkably similar in the effect they have on the achievement of their pupils when the socioeconomic background of the students is taken into account . . . When these factors are statistically controlled . . . it appears that differences between schools account for only a small fraction of differences in pupil achievement . . . It appears that variations in the facilities and curriculums of the schools account for relatively little variation in pupil achievement insofar as this is measured by standard tests."

For those who had been promoting increased and equalized expenditure as the path to quality education, such statements came as an embarrassing bombshell, and for a considerable period the Coleman findings on this subject were allowed to lie there, quietly unattended. By the early 1970s, however, a number of somewhat puzzled liberal scholars had decided to pursue the matter further—and as a result produced some additional studies which turned out to be minor bombshells in their own right. These documents made the point so clearly and explicitly that it could no longer be ignored.

First of these was a compilation of papers derived from a Harvard seminar on the Coleman Report, edited by Frederick Mosteller and Daniel Moynihan (*On Equality of Educational Opportunity;* Vintage Books), in which a group of 16 scholars re-examine the record on inputs (per pupil expenditure, school facilities, textbooks, etc.) and their relation to "outputs" (achievement skills of the students). The net result was to confirm the Coleman findings on essentials and to lay waste in every direction to liberal notions about the schools.

On the question of spending differentials, for example, the study reveals the conventional wisdom has the situation backwards. It is usually assumed that schools attended chiefly by Negroes are less adequately funded than those attended by whites, and that this disparity is most acute in the states of the Old Confederacy. Our scholars find the true particulars are just the reverse—that in many respects the level of spending on Negro schools is *higher* than that for schools that are chiefly white, and that where discrepancies exist in favor of whites they are less discernible in the South, not more.

Mosteller and Moynihan observe that "there did not turn out to be differences of such magnitude between the schools of Negroes and whites, within regions," and that the "tabulated data do not support the presumption of gross discrimination in the provision of school facilities in the South." Contributor Christopher

Jencks puts it that "despite popular impressions to the contrary, the physical facilities, the formal curriculums, and most of the measurable characteristics of teachers in black and white schools were quite similar."

Our scholars confirm as well the general view of the Coleman report that variations in school facilities has little to do with variation in achievement. Mosteller and Moynihan confirm the Coleman view that there was so little relation as to make it almost possible to say there was none. . . . The variation in these facilities seemed to have astonishingly little effect on educational achievement. One example is the importance to educational achievement of the pupil-teacher ratio—which the Coleman Report dismissed entirely because "it showed a consistent lack of relation to achievement among all groups under all conditions."

While the emphasis of the different scholars varies on numerous points, the overwhelming conclusion is that paying out money for the schools has no appreciable effect, beyond a certain threshold, on educational quality. A similar view is expounded by Jencks in a second study out of Harvard, conducted with the aid of a numerous team of research associates. This volume, entitled *Inequality* (Basic Books), is written from a strongly liberal-left perspective with a bias toward egalitarian formulae. Nonetheless, Jencks and Co. are relentlessly honest in assessing the results of such formulae and find the record immensely discouraging.

Their survey encompasses a vast amount of materials gauging just about everything connected to the schools, and reaches the finding that little of what is done by different schools makes much of a difference in educational product. In particular, they note, there is no demonstrable connection between having attended one sort of public school as opposed to another and results computed in terms of cognitive skill, further educational advance, or adult economic status. Among their conclusions on this score:

". . . no specific school resource has a consistent effect on students' test scores or on students' eventual educational attainment. . . . We can see no evidence that either school administrators or educational experts know how to raise test scores, even when they have vast resources at their disposal . . . Achievement differences between schools are . . . relatively small compared to achievement differences within the same school . . . *Additional school expenditures are unlikely to increase achievement, and redistributing resources will not reduce test score inequality . . .*

"Our research suggests . . . that the character of a school's output depends largely on a single input, namely the characteristics of the entering children. Everything else—the school budget, its policies, the characteristics of the teachers—is either secondary or completely irrelevant."

This is not the final word on the subject, since research on "outputs" is continuing, and the programs that Jencks and others would premise on such findings are often more distressing than the system they criticize—but that is a topic for another sermon. The relevant point for here and now is that spending millions for "quality" schools, on these researches, is a complete delusion.

It is from the perspective offered by these researches that we may best understand the phenomenon of "racial balance" busing—which has stirred such bitter political controversy all over America.

If there were ever an issue on which the American people have spoken as one, busing would appear to be it. Polls have shown the public by votes 70 to 80 per cent is opposed to busing and wants to maintain the neighborhood school. President Nixon has said he is opposed to busing, as have countless members of Congress. All across the land state officials and school boards have vowed their hostility to the practice, and those who waffle may find themselves removed from office. Just about everyone, it seems, is opposed to busing. So the question is this: Why do we have busing?

The standard answer of federal functionaries and liberal interest groups who have promoted busing is that the practice is required to overcome the effects of historic discrimination and to bring about authentic "integration," allegedly mandated by the U.S. Constitution and the nation's civil rights laws. It is supposed service to these legal requirements that the courts keep ordering "racial balance" mixes, crosscounty transfers, and avoidance of racial tipping-points.

Yet in point of fact such racial balance busing is directly *contrary* to the law of the land as previously stated by the U.S. Congress. The Civil Rights Act of 1964, which allegedly gives federal judges jurisdiction in such cases, says that " 'de-segregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." And it further states that ". . . nothing herein shall empower an official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance."

Busing forces prefer to ignore this language if possible, but when called upon to recognize it say it was meant to forestall busing only in cases of *de facto* segregation, not in cases where segregation has been accomplished by law. In the latter instance, it is argued, the courts may order busing or any other remedy to correct the discriminatory evil. This explanation explains little, however, since the author of the language in question, former Rep. William Cramer of Florida, explicitly noted that its goal was to prevent "*any* balancing of school attendance by moving students across school district lines to level off percentages where one race outweighs the other." To prevent, in sum, exactly what has been ordered by federal courts all over America.[1]

If "the law of the land" does not compel busing, what does? The answer may be discovered, once more, by going back to the Coleman Report—and to a companion study issued by the U.S. Civil Rights Commission entitled *Racial Isolation in the Public Schools* (1967). Between them, these two documents provide the official rationale for busing—which has almost nothing to do with the legal arguments usually tentilated in its behalf.

The Coleman study, as we have seen, found little relationship between the amount of money spent for schools and the educational product which issued from those schools. In the case of Negro pupils, in particular, it found no consistent correlation between the measure of educational inputs and the performance of children, who, in contrast to the standard expectation, "fall farther behind the white majority" as they proceed through the school system. Whatever the source of Negro educational deficits, the study found, "the fact is the schools have not overcome it."

Conventional integration apparently had minimal impact on the problem, but it suggested, the authors thought, a possible solution. They believed on the one hand that educational deficits were probably owing to a "combination of nonschool factors—poverty, community attitudes, low educational level of parents." They noted on the other that it "appears" pupil achievement is "strongly related to the educational background of the other students in the school." From these two factors it seemed to follow that "if a minority pupil from a home without much educational strength is put with schoolmates with strong educational backgrounds, his achievement is likely to increase."

Thus begins the rationale for busing—with more to follow. Prof. Coleman explained the matter further in a subsequent article, opining, that what we needed was a more intense reconstruction of the child's social environment" which goes beyond the matter of non-discriminatory school assignment. In particular: "For those children whose family and neighborhood are educationally disadvantaged, it is important to replace this family environment—by starting school at an early age, and by having a school which begins very early in the day and ends very late."

In the report of the Civil Rights Commission, a further point is added, making it clear that legal segregation is *not* in fact the issue—that separation of the races by reason of circumstance is just as objectionable as separation created by law. The commission asserted that both should be eliminated because "Negro children suffer serious harm when their education takes place in public schools which are racially segregated, whatever the source of such segregation may be." The commission therefore recommended that no school have higher than 50 percent black enrollment—to prevent it from becoming predominantly black in character.

In sum, the educationists became convinced and apparently convinced some of our federal judges that Negro children must be taken out of their homes and neighbrohoods and placed in an "artificial environment" created by government, where they will be immersed as fully as possible in an altogether different culture. The object is to break into the Negro family and culture pattern and remold black children according to guidelines preferred by middle-class (and predominantly white) social planners who think they have a commission to tinker around with the psychic makeup of the human species.

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[1] Nor is the '64 Civil Rights Act the only such manifestation of congressional intent. Over the past eight years Congress has expressed its wish that the busing cease and desist, that federal funds should not be used to promote busing, and that a moratorium be imposed on court-ordered busing plans. The judicial busers have treated these enactments with indifference, and gone right ahead to force the practice of busing on an unwilling nation.

Busing is essential to this enterprise. It is needed to immerse the black child in an environment of white classmates. It involves long periods of transportation which maximize the amount of time a child is away from his home and parents, and it takes him to a distant school where his parents in many cases can have little knowledge of what is occurring, can exert zero influence on the school's official performance, and would feel constrained from doing so even if they could physically reach the school.

At the same time the busing is required to shuffle the students around so no school will ever become predominantly Negro—which would reimmerse the student in the self-same culture he is supposed to be escaping.

Against that background it is apparent that nearly all the discussion which surrounds this issue is off the point. All that argument about *de jure* and *de facto* segregation is essentially phony, since the object is to prevent the schools from becoming black in character for whatever reason.

Unfortunately, busing has been no more successful than the other enthusiasms which preceded it. We now have a dozen or so surveys which weigh the effects of busing in diverse communities across the Nation, and the net of the evidence is that busing has not only failed to achieve its stated goals of improving educational skills and racial feeling, but in many instances has actually served to make the situation worse.

A major study on this issue was published in *The Public Interest* (Summer 1972) by David Armor of Harvard, an associate professor of sociology and a former researcher for the Civil Rights Commission. Armor brought together a series of studies involving some 5,000 school children in grades one through twelve, testing educational results of those who were bused against a control group who were not. Covered in this analysis were schools in Boston, Ann Arbor, Mich., Hartford and New Haven, Conn., Riverside, Calif., and White Plains, N.Y.

Armor found no consistent evidence of educational improvement as a result of busing, but considerable proof of adverse effects upon the students who were bused. In some instances there were slight gains for bused students, but in other instances the control group showed the greater degree of improvement. Moreover, the pupils who were bused developed lower educational aspirations and a higher degree of racial antagonism than did those who weren't—directly contrary to the theory.

"None of the studies," Armor concludes, "were able to demonstrate conclusively that integration has had an effect on academic achievement as measured by standardized tests. (In Boston) there was a significant decline for the bused students, from 74 percent wanting a college degree in 1968 to 60 per cent by May 1970 . . . the bused students were 15 percentage points more in favor of attending non-white schools than the controls . . . 80 per cent of the bused group said they were 'very favorable' to the program in 1968, compared to 50 per cent by 1970." Also in the Boston study, pupils in grades three and four showed slight gains in reading achievement over the control group, but in grades five and six students who were not bused did better than those who were. "The results for reading achievement are substantially repeated in a test of arithmetic skills," Armor says. "The bused students showed no significant gains in arithmetic skills, compared to the control group, and there were no particular patterns in evidence."

Half-way across the nation, in Ann Arbor, Mich., the results were much the same. Bused students did not make significant gains when compared to the control group, nor did the bused students cut into the black-white gap on achievement tests: "On the contrary, a follow-up done three years later showed that the integrated black students were even further behind the white students than before the integration project began."

These findngs have been updated in an extensive survey of the busing question by Jeffrey Leech of the Indiana University Law School (*Indiana Law Review*, Summer 1973). To the communities mentioned in the Armor study, Leech adds more recent data concerning busing experiments in Berkeley and Sacramento, Calif., Buffalo and Rochester, N.Y., and Evanston, Ill. On every major point at issue, the findings produced by Leech confirm the lugubrious reading of Armor's original report.

Leech observes that "of the 10 cities which have systematically studied the effects of busing on the achievement levels of school children, one shows moderate gains (Sacramento), two show mixed results (Hartford-New Haven, Rochester), three are inconclusive (Buffalo, Evanston, White Plains), and four show either losses or no significant gains (Ann Arbor, Berkeley, Boston, Riverside). In every city studied, busing failed to reduce the gap between black and white achievement.

"In fact, most cities reported that the achievement gap had grown even larger after busing. Scholars who have reviewed the evidence . . . have concluded that busing has little if any effect on the academic achievement of either black or white children. Thus the most recent sociological evidence fails to confirm a basic premise underlying the rationale for court-ordered busing; i.e., that it will positively affect the academic performance of minority children."

This author also examines data concerning self-esteem, achievement goals and racial harmony, and comes to similar negative conclusions. He finds the result of busing to be psychologically harmful rather than beneficial, and in particular to be a source of racial friction rather than amity. He notes several cases where antagonisms were directly traceable to busing and adds that "in no city did busing appear to increase interracial contact to better interracial understanding."

Leech urges a searching reappraisal of the whole busing enterprise, concluding that "in the light of the tremendous social, political and economic costs being paid for busing, the absence of any consistent educational gains, the deleterious psychological impact of busing upon black children, and the increasing polarization of the races, such a re-examination is long overdue."

Researches of this type will continue, of course, and it may be that sooner or later they will come up with a liberal program that actually works. For the moment, however, we are left with the impression of total shipwreck: The original formulae having failed, the remedies for those formulae turn out to be failing also. After the expenditure of billons upon billions of dollars for "quality" education and the instigation of massive upheaval in American communities through busing, the Federal educationists have little to show in terms of educational advancement.

In summary: Busing is not in fact mandated by the American Constitution, or by the civil rights statutes enacted by Congress. The thrust of legislation touching on this subject, in fact, has been the other way around.

Busing is opposed by an enormous majority of the American people. It is favored by a group of social engineers and planners, and certain congenial members of the judiciary, who believe that only by this drastic method can the failure of liberal educationist formulae be retrieved.

While busing has not attained the educational results projected for it, it has created an ominous precedent in which the state presumes to assert an interest paramount to the authority of the family.

On every conceivable count, therefore, the practice of busing is a mistaken one and should be halted by the Congress.

Prepared Statement by Irene McCabe, President, National Action Group, Pontiac, Mich.

Mr. Chairman and gentlemen of the committee, my name is Irene McCabe and I reside in Pontiac, Michigan. I am president of the National Action Group based in Pontiac but with membership throughout the entire state as well as supporters in many other states.

As I have on two other occasions appeared personally to testify on the negative effects of forced busing (before Senator Mondale's Committee in 1971 and before the House Judiciary Committee in May of 1972). I pray this written testimony be accepted and made part of the official proceedings.

Gentlemen, as your committee deals with the constitutional questions of forced busing to achieve a racial balance, I beg you not consider it bold of me who as a mother and victim of busing and not a legal or constitutional authority, asks once again to be heard. The Honorable Chairman Senator Samuel Ervin, the nation's most esteemed constitutional authority as well as the entire committee can learn from people such as myself nothing but the end product—the results—of ill-conceived forced busing.

I hasten to add that for my own enlightenment I have on several occasions read the Constitution of the United States and its many amendments and am in my own mind fully satisfied that the court ordered assignment of students to any school for any reason is clearly unconstitutional. Not only do I consider the question itself outside the domain of the judiciary but the biases and prejudices inherent in such decision making to be racist in and of themselves—therefore unconstitutional.

More important than the question of man made legal constitutionality is our need for human compliance with yet an even greater Law—The Law of Nature or if you please the Laws of God. For God in His great wisdom and in His love for man gave to us laws meant to protect the sanctity of the family as well as laws which clearly define the duties of each family member to each one another. If we could abide by these Great Laws in our "inner" families, we as a nation would soon find ourselves living harmoniously with the "family of man".

Instead the courts continue to destroy and erode the family, the community and the nation, which is, in the final analysis, no more than the "ultimate" family, the great composite of all the "inner" families throughout America.

When one separates by school, thus by many miles, mother from child, sister from brothers, the sibling relationship is greatly diminished. Where there was once a special family unit to render security and assistance in the strange unknown world of school our little ones now feel unsafe, alone and insecure.

Mother, in time of need is no longer just a few blocks away or just across the street. Instead she is many miles away and in all probability without a car. Thus the security of mother and home easily available in time of need is destroyed.

The family can no longer rely on one another because the courts have so effectively scattered all of its members. The family is no longer a safe secure inner unit ~~and as we~~ loose the unity of the inner family we also loose the unity of all the families as a nation.

Unfortunately we are told in every facet of our daily lives to ignore the Higher Laws and instead live by court decrees. I not only refer to forced bussing and the denial of my God given maternal rights to direct the upbringing of my children but I also refer to the ever increasing erosion of other freedoms.

We are no longer a free people as freedom was known by our forefathers. Life, Liberty and the Pursuit of Happiness are surely empty words to most Americans. The average person works hard at his job, gives more than is necessary and hopes for a promotion only to be told that our courts decree that one must not look to ability—look only to color. The average family will do all in its power and in most cases parents will sacrifice a great deal to provide a home in close proximity of the schools for the children they so love—only to be told by the court decree that those same children and their future are now in the increasingly powerful hands of the courts. Children, in essence, taken from the home community not because of parental neglect, but because of the color of their skin.

Is this freedom? Is this Life, Liberty and the Pursuit of Happiness? Or is this stupidity? How irrational and demeaning to people of all skin colors. On one hand we are told to be color blind and yet our courts, the highest law of the land, judge solely on color. Is it any wonder that so many of our young people have utter contempt for the "Establishment" (meaning adults) when instead of using logic, common sense and wisdom we instead revert to the ignorance of judgement by skin color.

Over the years voluminous testimony has been given on the pros and cons of bussing to achieve a racial balance. Some has been accurate but much has been so blatantly untrue that it causes me great distress to consider the responsibility of your committee. I know you will listen to many people, intellectuals, pseudo-interlocutors, specialists, titled people and lobbyists who will extol the virtue of forced bussing on their silver tongues, quoting self-serving statistics from self-serving surveys.

I urge you listen cautiously as these gilt edged words are in reality the gilt edge sword destroying our public schools. Lies, and the proclaimer liars. A strong indictment of many but made without fear as time will vindicate the truth.

Go into the communities where there is forced bussing—speak to the parents—not a select few—but the average parents. They cannot come to you as you are both fearful and awesome to most. We must not have the "audacity" to think we know what is best for our children—and yet we do know but no one will listen.

Speak to the students—not the select group served up on a silver platter by an administrator concerned only with protecting his position with the pretense that bussing is working. Or by a select group paid to come before you and testify by strong lobby group (making prostitutes of students by the lure of money). Not these very few but to the millions left unheard, filled with frustrations towards the adult world that will not solve its problems. Frustrations to want an education and yet to be denied.

I urge you to look upon pro-bussing testimony from Parent Teacher Groups as irrelevant because they do *not* exist. Forced bussing has most efficiently destroyed once meaningful and productive Parent Teacher Associations. If they could have survived they represent nothing.

How can there be a PTA if there is no parental involvement because parents have children in so many different schools.

Surely you will hear lengthy pro-bussing testimony from frightfully powerful Teacher Union Groups. I beg you to keep one thing in mind as you listen. They do not represent the rank and file members who are adamantly opposed to forced bussing. The overwhelming majority of teachers are opposed to what their union has endorsed and because the truth would jeopardize their jobs you will not hear from the average teacher either.

Many years ago we in Pontiac predicted from the experiences of those before us many things that would happen if the insanity of forced bussing was implemented. Unfortunately these predictions have become realities and as my previous testimony have gone into detail I wish only now to briefly touch on a few items.

Because of a phenomenon known as "white flight" (the refusal of parents to follow the unjust dictators of the courts) brought on by forced bussing the racial mixture has changed a great deal.

In 1971 before court ordered bussing, Pontiac school district had a student enrollment of 24,000 comprised of 73% white and 27% black students. We were so well integrated before bussing that of the 37 schools in the system only one had an all black enrollment and no school was all white. By the 1971–72 school year and the advent of bussing the racial balance changed to 63% white and 37% black student enrollment. The 1972–73 school year changed these figures to 61% and 39% respectively and the 73–74 school year indicates a 59% to 41% racial mixture. And the enrollment now has dropped to 20,000 students. These figures tell more than a thousand words. Forced busing is creating segregation not integration and is destroying our city.

Forced integration was never a necessity in our city, as I have stated, we were already integrated. Despite testimony given to the contrary, Pontiac was not guilty of dejure segregation. Historically youngsters attended their neighborhood schools, therefore in a predominately white neighborhood there existed a predominatingly white student body, and the same was true in all neighborhoods, whatever the racial make-up.

If this is a problem, and I do not say that it is, it is surely not the fault of the schools and the children should not be made to suffer a lie. If the courts want to deal with integration of the races then let them honestly and openly say as much—and not cowardly hide their motives behind our youngsters.

And if we discuss integration, we talk about an ideal. A voluntary working relationship between the people involved—not a forced condition. A situation of harmony which can exist only when one chooses to be a part of that relationship. Integration will come in its own time, but from the heart and not from a bus.

As to academic achievements and how they are affected by forced bussing this statement of fact can be made. Each year the State of Michigan tests every 4th and 7th grader in the public schools and rates them accordingly. In the last year prior to the implementation of bussing Pontiac was rated in the 5th percentile and now our youngsters have dropped to the very, very lowest percentile. This alone should be sufficient indictment against the cause of forced busing.

If, as I believe, the duty of a educational system is to educate, one must admit to a dismal failure. We have condemned our children to a future of mediocrity and our system of government to ultimate doom.

Much has been heard extolling the virtues of forced bussing as it relates to changing attitudes among the races. Again, dear friends, these are self-serving lies. Violence in the schools of such districts has in most cases reached such proportions as to necessitate the shortening of the school day, to eliminate lunch periods. Indicating that it is unsafe and unwise to allow a student body even such a short time together on a free period. Is this the desired end of the courts? Is this integration?

How or if this can be translated to the question of constitutionality is for your great minds to determine.

I can only testify as a mother and a citizen who watches in horror as our public school system slowly dies from the malignancy of weakness. Weakness of those who could, if they but had the courage, reverse this sickness and return our school to the proud institutions they once were.

I watch in horror as the minds of our children, the future of any nation, are molded by a judiciary gone insane with its own power. We want our children back, to be guided by loving parents and a loving God.

PREPARED STATEMENT BY CARL J. MEGEL, DIRECTOR OF LEGISLATION, AMERICAN FEDERATION OF TEACHERS

My name is Carl J. Megel. I am the Legislative Director for the American Federation of Teachers (AFL–CIO). Our organization consisting of more than 400,000 members includes teachers at all levels of education, as well as paraprofessionals, teacher aids and certain other related school employees.

The American Federation of Teachers by convention action has supported bussing as a necessary implementation to attain quality education for all students in the public schools of our nation. For that reason we oppose the four bills now being considered namely: S. 179, S. 287, S. 619 and S. 1737.

These four bills, even though they use different language and effect different approaches, have two things in common: First, they tend to render Supreme Court decisions ineffective; and second, they tend to reestablish the separate but equal educational formula which in effect is not equal but always unequal.

Although such language as "judicial remedies" or "freedom of choice" and "neighborhood schools" are proposed as remedies, the fact is that this approach has been overruled by the Supreme Court in a number of cases. Moreover, any return to the passé position of separate but equal is unjustified in our present day advanced social order. Every report, record or appraisal indicates that separate but equal is and has always been unequal in its relations to education of children.

May I call attention to one other fact, which is quite self-evident. Certain sections of the proposed bills give the indication of amending the Civil Rights Act of 1964. Unfortunately, the language does not amend; it repeals certain significant parts of the provision of the Civil Rights Act as applied to education. Other sections purport to provide "freedom of choice" a phrase which has democratic connotations but which many Courts have rejected as an effective device for the desegregation of the public schools of our nation.

All the remedies proposed in the various bills have been considered by the Courts in previous litigation before student-bussing was ordered. We feel that these proposals do join the groups which have attacked the Courts ever since the Brown vs. School Board decision. Their only purpose in our opinion is to bring about a weakening of the Courts' position rather than to diligently bring about effective desegregation.

We feel that 20 years of delay in implementation of the Brown decision is long enough. This is no time to continue indefinitely a delay especially at a time when the Brown decision has a chance to become fully effective.

In the interest of advancing educational opportunities for all of the children of our nation, we respectfully urge the Committee to oppose any legislation which would delay or attempt to delay the desegregation of our schools and instead implement the Courts' directive in all areas.

PREPARED STATEMENT BY JAMES F. O'NEIL, VICE PRESIDENT, STATE BOARD OF EDUCATION OF MICHIGAN

"You do not protect the rights of anyone by violating the rights of everyone."

Court-ordered, forced-busing is nothing more or less than court-ordered discrimination and is just as wrong as any other type of discrimination. If the judges can take away these rights, then all of our rights and freedoms are in jeopardy. And, if judges can usurp the powers of Congress, our whole system of government is in jeopardy.

I predict that the U.S. Supreme Court will order cross-district busing for racial manipulation in the Detroit metropolitan area which will set a precedent for busing all other metropolitan areas in the nation.

I base my prediction on:

1. The 7 to 1 U.S. Supreme Court decision ordering busing of school children for racial manipulation in Denver, Colorado (on the basis that any segregation can lead to total busing) and

2. Justice Powell's (who will be the swing vote) opinion in the Denver case when he said: (a) "Segregation is segregation no matter how it came about" (which ignores the difference between de facto vs. de jure segregation), and

(b) "We must recognize that the evil of operating separate schools is no less in Denver than Atlanta" (he might as well have said Detroit, Indianapolis, San Francisco or any other metropolitan area for that matter).

The U.S. 6th Circuit Court of Appeals approved the principle of busing across school districts in the Detroit Metropolitan Desegregation Case. On this basis, it seems predictable that the U.S. Supreme Court will order busing for racial manipulation which could involve 780,000 children in the Detroit Metropolitan Area and set the precedent for busing in all metropolitan areas in the nation.

I fear that as one of the dissenting 6th Circuit Appeal judges (Wieck) stated, "It is a decision (Detroit Desegregation Case) with legal monstrosities." Judge Wieck described as incredible a statement by Judge Roth that courts are called upon in school cases "to attain a social goal—using the law as a lever." Judge Wieck said: "Courts are not called upon to integrate that school system, using the law as a lever—nor should judges assume to act as legislators for which they are neither fitted nor qualified. It is enough for judges to perform their judicial functions and to abide by the separation of powers doctrine provided by our constitution."

1. In the words of dissenting Judge Wieck:

A. "It will involve about 780,000 children and, if ordered by the court, will force the busing of black children, against their will and without the consent of their parents, from the inner city of Detroit to one or more of the fifty-three different school districts in four counties, and the white children of these districts will be forcibly bused to the inner city. None of these children have committed any offense for which they should be so punished. It will disrupt the lives of these children and their parents. The metropolitan plan was ill conceived and is a legal monstrosity.

B. "The District Court (Roth) made no finding that any of the fifty-three school districts outside of Detroit had practiced desegregation tactics against Negro children in their districts or in any other district, or that they were in any way responsible for the concentration of Negroes or their segregation in Detroit.

C. "No decision of the Supreme Court or any other court construing the Constitution supports this thesis and it is not our province to rewrite the Constitution.

D. "The majority opinion also conflicts with Bradley v. School Board of Richmond, supra, and Swann v. Board of Education, 402 U. S. 1 (1971). Swann stated: 'The objective is to dismantle the dual school system.' Here there has been no dual school system to dismantle."

E. Swann also stated: "If we were to read the holding of the District Court (Roth) to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse."

The metropolitan plan violates this principle which was applicable only to dual systems. It is even worse when the District Court (Roth) applies broader orders to a unitary system than have ever been applied to dismantling of a dual system.

F. "An order requiring the adoption of a metropolitan plan under the facts of this case, merely to dismantle the concentration of blacks in the inner city, violates constitutional rights of both races and constitutes a flagrant abuse of judicial power.

G. "The metropolitan busing remedy ordered by the court is, however, unconstitutional on a more fundamental level. It invalidly assumes that the equal protection clause of the Fourteenth Amendment protects groups and not individuals. The entire thrust of the District Court's order is that the rights of blacks as a group must be redressed and that, in the process, the rights of individual black children (and non-black children) may be disregarded.

H. "It simply defies logic to have a constitutionally required remedy for a group of individuals which, in turn, unconstitutionally denies equal protection to the individuals in the group as well as individuals in other groups, and which remedy unconstitutionally imposes burdens on students within and without the group solely because of their race. Yet this is precisely what the District Court has held."

While I am in complete support of eliminating the barriers to integration and correcting de jure segregation. I know of no evidence to substantiate that busing for racial manipulation either improves academic achievement or racial harmony. In fact, there is evidence that proves to the contrary—that children do better in their neighborhood schools than children who have been bused for racial manipulation. In addition, in Michigan we have programs which have raised the achievement level of disadvantaged children in the inner city 130% in one year. This proves:

1. That every kid in this country can learn (and in their neighborhood schools) if provided the proper educational assistance, and

2. There is no neeed to:

(a) violate the constitutional rights of black and white children and their parents by busing for racial manipulation;

(b) needlessly spend millions of dollars to punish and disrupt the lives of 780,000 children who have committed no offense; and

(c) set this extremely dangerous precedent of permitting judges to usurp the prerogatives of legislators for which they are neither fitted nor qualified.

I believe this arrogance of the judges, which borders on judicial tyranny, threatens the basic fabric of our democracy and must be stopped immediately before it decimates our school system and precipitates massive civil disorder in our society.

I believe this tragedy can be averted if Congress acts and acts expeditiously to:

1. Pass the Equal Educational Opportunties Act which (a) supports the neighborhood school concept; (b) provides funds to improve inner city schools; and (c) establishes guidelines for any approved transferring of students.

2. Pass legislation providing for tuition-free college education, and

3. Pass legislation to limit the terms of appointment of judges to 8 years (subject to reappointment) and requires their mandatory retirement at 65.

This will provide equal opportunity to appoint judges who: (a) have neither grown old nor arrogant, and (b) have neither lost touch with the Constitution nor erroneously believe themselves to be legislators.

I realize that in 1972 the House passed the Equal Educational Opportunities Act. I also realize that the majority of the members of the Senate were in favor of this bill. I also know, as the public knows, that a few ultra-liberals prevented a vote on this crucial bill by filibustering it to death. The public and I also know that while many of these ultra-liberals advocate the forced-busing of school children for racial manipulation, at the same time they send their own children to private schools. This is undoubtedly one of the reasons the public's esteem of the Congress and the Senate is at such a low ebb.

I, therefore, request you in the name of justice and in the name of our democracy to act and act expeditiously to pass legislation which will prevent discriminatory court-ordered busing but which will provide real equal educational opportunity. Your expeditious actions can also prevent the judiciary from usurping your constitutional responsibilities and threatening to cause massive civil disorder in our nation. However, you must act before the Supreme Court acts if you are to fulfill your constitutional responsibilities and prevent a national tragedy. I hope and pray that you will.

[From the Detroit Free Press, Sept. 7, 1973]

VALUE OF SCHOOL BUSSING IS CHALLENGED

(By David J. Smollar)

LOS ANGELES.—Sociologist David Armor believes that the classroom may be the worst place for society to bring about integration, whether the goal is higher academic achievement or better race relations.

Armor, a senior social scientist at the Rand Corp. in Santa Monica, Calif., examined data on "induced integration" (bussing) in Boston; White Plains, N.Y.; Ann Arbor, Mich.; Riverside, Calif.; and New Haven and Hartford, Conn. His findings are contained in an article in the quarterly academic journal, The Public Interest.

He determined that no black educational gains had occurred as a result of the bussing programs, although such gains were expected.

His negative findings agree with results of other recent educational studies that question the schools' ability to compensate for the disadvantages of underprivileged groups. These studies have raised basic questions about the role of social science in public policy and have brought strong reaction from supporters of school desegregation.

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In an interview, Armor spoke about his study and its controversial implications for education and society.

"My conclusion was that bussing is not an effective policy instrument for raising black achievement levels," he said. "If the criterion for desegregated schools is academic gain, little can be done by them to alter achievement patterns as measured by standardized tests."

While Armor's findings were about specific bussing programs, he feels they pertain to a whole variety of programs in the educational field intended to solve problems of deprived minorities.

"I also found that school desegregation has brought about an increase in racial tensions in cases where it has been studied," he said. "However, these results are not conclusive—there is little data on the topic, except for some nonsystematic journalistic accounts."

But Armor believes achievement results are independent of whether or not two ethnic groups get along.

Because of the emotion surrounding this subject, Armor was asked if he has had second thoughts about having his ideas published in a popular academic journal. Since his findings might be used in a political way not intended, many people are worried that the results will buttress efforts of officials trying to cut spending on social welfare programs.

"I didn't like my results," Armor said, "but I felt it vital to publish them, and have them read. I was going against a strong educational momentum based more on ideology (than on social science) than I had suspected. The recourse would have been for the public not to know the facts.

"It's especially vital for the black community to have such information, because it's most directly affected by these programs.

"I am intrigued by how the current educational research parallels a contemporary conservative swing politically. It suggests fundamental processes are occurring. But I guarantee that none of this research is sponsored by some conservative group."

[From the Detroit Free Press, Sept. 9, 1973]

BUSING OPPOSED BUT INTEGRATION DRAWS SUPPORT

(By George Gallup)

PRINCETON, N.J.—Most Americans apparently favor public school integration, but few approve of busing as a means to reach this goal.

A recent nationwide Gallup Poll indicates only five-percent support for busing. But 27 percent of the respondents favored "changing school boundaries to allow more persons from different economic and racial groups to attend the same schools," and 22 percent favored "creating more housing for low-income people in middle-income neighborhoods."

Another 22 percent do not choose either of these plans but favor some other way to achieve integration. Only one person in five said that he opposed the integration of schools.

The survey indicates that much of the opposition to busing stems from reasons other than racial animosity. These include the belief that busing is an infringement of personal liberties, worry about busing children to schools in different neighborhoods, and concern that busing will increase local school taxes.

But the gap between blacks and whites remains wide. Overwhelming majorities of whites express satisfaction with the work they do, their income, housing, their children's education.

This gap is also apparent in attitudes on the "quality of life" in one's community and on the future facing a person and his family.

Nearly eight in 10 whites say they are satisfied with the "quality of life" in their communities, but only about half of blacks agree. In addition, 56 percent of whites say they are satisfied with the future facing them and their families, while a far smaller percentage of blacks, 43 percent, do so.

Approval of interracial marriage has increased from 20 percent in 1968 to 29 percent in the latest survey.

Prejudice toward blacks in politics has declined to its lowest point yet recorded. In 1958, only 38 percent of all adults said they would vote for a qualified Negro for president. The latest figure is 70 percent.

The same survey indicates that most white parents, both in the North and South, would not object to sending their children to a school where as many as half of the students are black.

Among white parents in the North, however, objection to having their children in predominantly black schools has increased since the previous survey in 1970 (from 51 percent to 63 percent).

In the 10 years since the 1963 civil rights "march on Washington," nationwide Gallup surveys taken at regular intervals reveal that blacks feel that their living conditions have greatly improved and that white attitudes have become more tolerant.

The percentage of blacks who say they are satisfied with their work has grown from 54 percent in 1963 to 63 percent in the most recent survey on the subject. Satisfaction about housing for blacks has risen from 43 to 51 percent, and about education, from 42 to 57 percent.

The Advocates of Busing Preach But Don't Practice

(By Paul Harvey)

Now we're going to see whether a more moderate Supreme Court can heal the hurts deriving from school busing.

This is the court of last resort—since many members of Congress continue to talk one way and act another.

Who?

Ask Sen. Ted Kennedy where his son goes to school, he will tell you "that's a private matter."

His private practice does not parallel his public position.

His son attends a private school. It costs him $2,400 a year to send his son there. He can afford it.

And it's interesting to note how many of the 100 per cent ADA liberals who are persistently telling you to bus your youngster across town to achieve a black-white balance send their own children to private schools where there are no blacks or where the ratio is eleven to one white.

And arch-liberal Birch Bayh of Indiana also has a son attending a private school.

Sen. Ed Muskie calls busing a "necessary tool." He says "from time to time we must use uncomfortable means" to achieve a proper objective.

He also sends one of his daughters to a private school. Of 245 students there, only three are black.

Two other Muskie children go to another Catholic school nearby where none of the 446 students is black.

And Sen. George McGovern has blasted the President for opposing compulsory busing saying, "the President has encouraged contempt for the law . . ."

McGovern, when he lived in the suburbs, sent his daughter to a private Catholic school. Now living in the District, the daughter is sent daily to a Bethesda high school, tuition for nonresidents, $1,450. Percentage of blacks, about 3 per cent. In District public schools the percentage is 95 per cent black.

Then there's Sen. Walter Mondale, the dedicated reformer of other people, who recently removed his son from a Washington, D.C., public school and enrolled him at a Georgetown day school.

There his classmates include children of Sen. Philip Hart.

Interestingly, the first black appointed to the Supreme Court, Justice Thurgood Marshall, sent his two youngsters to this private school where the tuition may be from $1,600 to $2,000.

The black mayor of Washington, D.C., sent his daughter there—now sends his granddaughter—in a chauffeur driven car bearing the mayor's license plates.

And black liberal Washington, D.C., congressman Walter Fauntroy, enrolled his son in a private school. And Democratic Congressman Donald Fraser of Minnesota took his daughter out of a mostly black public school and put her in a Georgetown day school.

Similarly, the big name liberals in the District press corps, whose publications urge busing for the rest of us, buy a way out for their children: Phil Geyelin and Ben Bradlee of the Washington Post, Tom Wicker of the New York Times, liberal columnist Nicholas von Hoffman.

Perhaps Von Hoffman spoke the hearts of all these parents when he told NBC's Mike Wallace that he "did not want to make his children pay for his own social philosophy."

He did not want to make "his children" pay.

"DO WHAT I SAY, NOT WHAT I DO"

Frankly, we're disenchanted.

A federal judge in Richmond, Va., recently ordered the schools of that city and two suburban counties to merge for the purpose of integration.

When we heard of the Richmond order, we pictured behind it the righteous hand of a true libertarian, a man whose deeds would match his principles.

Imagine our surprise and sadness last week when we learned that U.S. District Court Judge Robert R. Merhige Jr., who handed down the controversial order, sends his 11-year-old son to a private school in Richmond's advantaged west end!

One of the compelling theories behind integration, we recall, is that disadvantaged children will benefit from going to school with children from families that have enjoyed greater benefits in our society.

Cornelius Golightly, member of the Detroit Board of Education, says there are but two ways to improve a student's achievement. One is to improve the socio-economic level of his family. The other is "to make sure that the schools have a majority of middle class students, who serve to pull under-achievers ahead with them."

Under such a theory, the least a true libertarian in a high socio-economic class can do is send his own children to public schools, where they can help raise the achievement level and where they will be available for programs of integration ordered by a concerned judiciary.

When asked about his failure to do so, Judge Merhige retorted:

"When I'm on the bench, I'm a judge and when at home, I'm a father."

Which is tantamount to saying that as a judge, he deals with theories but as a parent, he deals with realities. He wants what is best for his child and most convenient to himself.

That's exactly what millions of other parents say when told that they may have to give up their neighborhood schools and send their children on buses to other districts.

PREPARED STATEMENT OF DALE P. PATTISON, PH. D., PRESIDENT, BOARD OF EDUCATION, KALAMAZOO, MICH.

Description of Court-ordered, Racial-Balance Busing situation in Kalamazoo, Michigan by Arthur Staton Jr. (Attorney for Defendant Board of Education in the: Michelle Oliver et al vs. Kalamazoo Board of Education et al Civil Action K-88-71) and Dale P. Pattison, President, Board of Education, Kalamazoo, Michigan.

The Kalamazoo School District is and has always been comprised principally of the City of Kalamazoo. Neither it nor the City acquired significant black population until after World War II. In 1940 its black population did not exceed 2%; by 1970 it had increased to approximately 10%.

Negro families can and have resided in all parts of the City. They have concentrated, however, in a wedge-shaped area between the New York Central and Pennsylvania Railroads in the northern part of the City, and by 1970 82.6% of Kalamazoo's Negro population resided in 5 census tracts. *The Kalamazoo School District neither caused nor contributed to the black population's migration to and concentration within the City of Kalamazoo.*

The Kalamazoo School District has neighborhood schools, especially on the elementary level. The size, location and boundaries of the schools were drawn so as to serve convenience, economy, safety, parent-child participation, and other equally meritorious considerations. By 1970 there were 29 such elementary schools, with 9,807 elementary students. *These neighborhood schools were open to and received all persons residing within their boundaries, regardless of race, color or creed.* By 1970 *each* of the 29 schools had one or more minority students, and all but *four* had at least some Negro students.

The make-up of a neighborhood school's student population reflected precisely the racial, economic, social or other make-up of the neighborhood. Because of black residential concentration, by 1970 five schools (Lincoln—92.7% black; Northglade—86,0% black; Woodward—57.3% black; Roosevelt—46.3% black;

and Edison—17.8% black) housed approximately 80% of the elementary black children residing in the District.

Though the educational opportunity offered by the School District in each of its neighborhood schools (buildings, equipment and other facilities, courses, teachers and all other input factors) was equal; the average achievement level within the neighborhood schools varied widely *and in direct relationship to the socio-economic make-up of the neighborhood*. Low socio-economic neighborhoods, whether black or white, produced a low achieving neighborhood school student body, regardless of the educational opportunity offered by the school itself. There has never been and there is not now any *independent* relationship between *racial imbalance* and *achievement*.

Commencing with the first available state and federal programs, the Kalamazoo School District has maximized its efforts to focus specialized compensatory help to all neighborhood schools which evidence economic and educational deprivation, and this assistance has gone to black and white alike. To this extent the District has offered more than equal educational opportunity to its economically and educationally deprived students.

In 1967 the Kalamazoo School District began its studies focused upon balancing and integrating its schools at all levels. These studies focused equally upon racial and socio-economic balance and integration. Both administration and citizens' committees were appointed, functioned and reported to the board. The *preparatory steps* (preparing the community, the children and teachers and staff) recommended by these committees were adopted by the Board and implemented or partially implemented during 1969 and 1970. The choice, character and detail of plans for integration and the date for their implementation were not adopted, but were left instead for study dependent upon the progress of preparation. By early 1971 plans for integrating the high and junior highs were adopted.

On April 5, 1971, though the Board had not previously considered nor adopted a plan or a date for its implementation, a 4–3 majority of the Board passed a resolution calling for integration of the elementary schools by September of 1971, and for submission of a plan for such purpose within 30 days. Thirty-two days to the day thereafter such a plan was conceived, prepared and adopted by the same 4–3 Board majority. At the time this plan was initiated, considered and adopted, two members of the majority 4 faced re-election with terms expiring in July. The proposed plan undertook balance *solely on the basis of race* and called for massive busing, not only to achieve racial balance, but to shift students in keeping with a grade breakdown in the elementary schools. Elementary schools were changed from K–6 so that all were K schools, some were 1–3 schools, and others were grade 4 through 6 schools. The precipitate action of the Board under the circumstances described, coupled with the revolutionary changes wrought by the plan, violently divided the community. In the ensuing elections two Board members who opposed the plan's adoption were elected with large majorities, and on July 6th the new Board passed a resolution which *postponed* the implementation of the prior adopted plan for *one year* pending *further study*. In the interim the Board adopted a voluntary plan permitting transfers and transportation where such transfers improved racial balance.

In mid-August the NAACP, among others, commenced action to rescind the July resolution and compel implementation of the prior plan by schools beginning in September. On August 20, 1971, the Federal District Court conducted a preliminary hearing and issued its injunctive order, which, among other things, rescinded the July resolution and ordered the District to implement the massive racial balance and busing plan adopted on May 7th. The trial court's order was affirmed on appeal and the litigation is now in pretrial preparation for trial on the merits on the earliest date available to court and counsel.

Thus, a school district that neither caused nor desired racial imbalance or segregation has been found, on two days' hearing held on five days' notice, and has been treated precisely as though it were a district which had purposely planned and ordered the segregation it neither desired nor caused. The citizens are locked into a racial balance plan which deprives nearly everyone of all benefits of the neighborhood school. The sole rationale for the plan is racial balance, and this balance is totally unrelated to educational achievement. In attaining balance solely for this reason, socio-economic imbalance has in certain instances been aggravated and increased. Attendance boundaries and feeder patterns are confused, and uncertain, and children, as they progress through the schools, are divided, one-half from K to 1st grade. Another division occurs at 3 to 4, another at 6 to 7. Though the Kalamazoo citizens have accepted the plan, to their great credit, they understandably seethe with smoldering resentment the senseless turn of events that placed them in their present predicament.

Our community, thereby, became the only one in the country where there has been court ordered busing without first being found guilty of segregative practices. After a two year delay Judge Fox held a brief trial and found the defendant School Board guilty of permitting a condition of *de facto* segregation to exist and, also, that the act of postponement was intended to be a recision. In other words, we were found guilty of *not* taking actions the Judge believed to be necessary and for what he believed to be our *motives*. The Judge ordered that his "temporary injunction" become permanent and that periodic adjustments of student assignments to schools should be made so as to ensure the desired racial mix.

It should be noted that while in the beginning of this lengthy affair the term "racial balance" was used unabashedly by the Judge and the proponents of the scheme, during the past year or more they have avoided the controversial wording and chosen to use the title "desegregation plan". But as the Bard of Avon reminds us a rose by any other name still smells the same.

Needless to say, the Board of Education has appealed to the Appellate Court in Cincinnati for relief. Nearing the end of the third year of court-ordered, racial balance busing we as yet have not had a hearing. We have lost twenty percent of our student population and spent in excess of $4,000,000 in implementing the court order. It has been detrimental to several aspects of our academic program and has produced no demonstrable improvement in the academic achievement of Black children. The restrictions placed upon school officials by the court order prevent us from designing and implementing viable and desirable alternatives. Probably, however, the most serious consequence of the Judge's order on our citizens has been their loss of faith in our supposedly democratic institutions.

The educational problems in Kalamazoo are real ones. Many children are not achieving satisfactory academic results in the public school system. By any standard of measurement whether evaluating the pupil's achievement, behavior or attitudes our schools are not succeeding with a large number, perhaps most, of our youth. The causes of this condition are many.

Some poor achievers have limited mental abilities, some have physical disabilities and others are under-nourished. Many have little incentive or poor motivation because of home, classroom or environmental circumstances. Too often youths have negative self-concepts and adjust their behavior to their limited expectations of themselves. Most, as is to be expected of their stage of maturation, lack self-discipline, a sense of responsibility and requisite social skills. In addition, many young people were being discouraged from learning and succeeding in school by social revolutionaries, the advocates of a so-called counter-culture and various social and academic misfits. These lemming-like provocateurs thrive in college communities like Kalamazoo.

If we agree on why students are performing poorly, then the question becomes what can "busing" do to solve these problems? The answer is that very little good and potentially great harm can come of it. Before considering the dubious and detrimental effects of compulsory busing remember certain basic truths about education. Researchers find "awesome differences" in verbal and mathematical competence between lower and middle class children entering school. At age eighteen a youth has spent only one-tenth of his life in school. The role of schools, then, in effecting intellectual and behavioral change must not be exaggerated.

COSTS OF FORCED BUSING

	1970-71	1971-72	1972-73	Budget 1973-74
Actual costs:				
Transportation costs [1]	($303,253.17)	($698,641.38)	($797,239.19)	($848,453.00)
Increase		395,388.21	98,597.81 +395,388.21	51,213.81 +395,388.21 +98,557.81
Lunch room equipment	72,000.00	?	?	
Food services (elementary schools) estimate	(30,000.00)	86,400.00	90,000.00	95,000.00
Noon-time supervisors (elementary schools)	[2](78,594.00)	88,831.57	85,644.80	124,560.00
Bus loaders (elementary schools)		22,800.00	[3](35,087.84)	[3](52,170.00)
ESAP		263,697.33	256,738.67	
ESAA				459,000.00
Legal costs for busing	1,380.60	40,479.04	108,154.86	100,000.00
Bus riders		?	?	?
Cost of moving to grades 1 to 3 and 4 to 6		?		
Total actual costs	181,974.60	897,596.15	1,034,524.35	1,323,759.83
Grand total				3,437,854.93
Speculative costs:				
Loss in new industry in area		Millions ?	Millions ?	Millions ?
Cost of additional food consumed at Federal and State expense		?	?	?
Loss to individuals in real estate values		20,000,000.00 ?	?	?
Other Federal funds		?	?	?
Other State funds		?	?	?
Decline in revenues due to enrollment decreases		160,000.00	108,000.00	46,800.00
(Students lost times dollar State aid and figuring 80 to 85 percent left because of busing)		(1,099 × $175.60)	(728 × $170.90)	(482 × $121.55)

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[1] Higher than normal transportation costs in 1970-71 because of model schools.
[2] Estimate.
[3] Part of transportation costs.

Furthermore, it must be borne in mind that "equal educational opportunity" is an unobtainable goal. There can be no such "equality" per se. But reason and justice dictate that we should ensure that each child has an equal right and opportunity to make the most of his life within his capacity and capabilities.

Schools should not become the scapegoat for the rest of society's sins of omission and commission. Year after year we have dumped more tasks on an overburdened school system, expecting it not only to teach children how to read, write and count, but also to effect moral, social, psychological and, even, political miracles in a few hectic and over-crowded hours in a day.

The effects of the court-ordered, cross busing program in Kalamazoo have been detrimental in several ways. It has consumed substantial resources which could be directed to other educational programs. The costs of additional teachers, administrators, service workers, noon lunch programs and transportation are heavy. Time wasted in transporting pupils diminishes still further the student's exposure to school. There is more tardiness and absenteeism and the plan discourages extra-curricular activities. It seriously restricts library use, athletic and music programs and special help for pupils by their teachers.

Along with the program for integrating blind, deaf, emotionally disturbed and physically handicapped students with their peers the mixing of pupils with widely divergent cultural and family backgrounds and abilities has increased the complexities of the classroom teacher's responsibilities. The teachers ability to meet the individual needs of each child consequently is diminished as the pluralism in the classroom increases.

The program has increased the stratification of age groups in our society. Youth has much to learn from experienced older people (and vice versa) and youngsters learn much from older youngsters. The present division between "early" and "upper" elementary grades is, therefore, inimical to learning.

Compulsory busing has created more racial identification, not less. It has produced more negative attitudes towards school and, ironically, it worsens the self-respect and self-image of minority children. Any quota or racial balance scheme implies that minority children are inherently inferior. Those whom the scheme was designed to help are the ones who suffer most.

The loss of local community and parental control to more centralized and dissocial agencies exacerbates the individual's sense of alienation and impotence. Anxieties, frustrations and anger thus become directed at the public schools. Those parents who have the highest academic expectations and are the most successful economically are the first to withdraw their children from the school system. 2,352 students transferred from the Kalamazoo School System during the first two years of the busing program. The conclusion may be drawn that most were objecting to busing. Such an exodus performs a gradual lobotomy on our community and its schools.

Hopefully we can learn something from the busing issue. We can recognize the limited role that schools and teachers play in our lives. We can not only sympathize with disadvantaged children but design educational programs for them which better meet their needs. There are several viable and preferable alternatives to forced busing. We must give greater attention to the pre-school mental development of children. We can appreciate the significance of the family and home as the source of most of our values and interests. While we must not overlook the cruel and soul-destroying effects of housing and job discrimination, intolerance and ignorance in our country perhaps, by expecting less of society as a whole, we may assume more individual responsibility. By observing the effects of artificial and forced integration upon minority children black, red and yellow we should think how we are grossly insulting minorities that deserve no further insult from white America.

In the 1954 Brown vs. Topeka decision when our Supreme Court ruled that government could not separate children by virtue of their race, creed, or color the editor of one of our nation's leading newspapers cautioned that this did not mean that government could force them together. When will we need this wisdom? Does integration mean homogenization? Or will we learn to respect each other and settle our differences through reason, persuasion and example?

EXCERPTS FROM MEMORANDUM ON "ANTI-BUSING LEGISLATION IN THE 93RD CONGRESS" BY RICHARD T. SEYMOUR,[1] ATTORNEY

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A. THE PRESENT STATUS OF THE LAW OF SCHOOL DESEGREGATION

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B. THESE ANTI-BUSING PROPOSALS VIOLATE THE CONSTITUTION BECAUSE THEY END ALL POSSIBILITY OF EFFECTIVE SCHOOL DESEGREGATION

Section 2(a) of S. 179 would prohibit any Federal court from issuing any order "the effect of which would be to require that pupils be transported to or from school" where this is done for the purpose of desegregation. Section 203(a) of S. 619 prohibits any Federal court from ordering any plan "that would require the transportation of any student" to any but the two schools closest to his or her residence, even if other appropriate schools are within his or her neighborhood.[2]

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[1] This memorandum draws extensively upon both the ideas and the language of memoranda written by Lewis D. Sargentich and myself in response to the 1972 Administration anti-busing proposals.

[2] S. 2555, more candid than other anti-busing proposals, disapproves even student assignment orders not requiring or involving transportation, where they are made pursuant to a desegregation plan. Its statement of policies does not seek to alter the powers of the Federal courts. It seems plain, however, that the draftsman of S. 2555 hopes it will be shown deference by the courts. If such deference is shown, a Federal court would not order that a new black child in a neighborhood be admitted to a predominantly-white school across the street from his house.

Judicial experience prior to *Swann* makes it plain that these proposals would bring about a truly astounding—and profoundly unconstitutional—result. They would prohibit *every* desegregation technique involving pupil assignment in the elementary grades—zoning, pairing, or other techniques such as selective school closing, shifting the location of portable classrooms, etc.—by virtue of the indirect effect of greater transportation. The prohibitions would operate, as a practical matter, even when the techniques are restrained by the Fifth Circuit's "contiguity" requirement. Moreover, S. 179, S. 2555 and in some circumstances, S. 619 would defeat pairing and zoning *on a neighborhood basis*, as in *Mannings, supra*, or as in *Ross v. Eckels*, 434 F. 2d 1140 (5th Cir., 1970), where the zoning-and-pairing plan for Houston resulted in "contiguous school zones . . . well within any reasonable definition of a neighborhood school system." 434 F. 2d at 1141. Finally, in many circumstances, these bills would prevent implementation of every "majority-to-minority transfer" plan, under which a student may elect to transfer from a school in which his race is in a majority to a school in which his race is in a minority. As the Supreme Court noted in *Swann*, such a transfer scheme "has long been recognized as a useful part of every desegregation plan"—it is "an indispensable remedy," and of course, "[i]n order to be effective, such a transfer arrangement must grant the transferring student free transportation. . . ." 402 U.S. at 26–27.

Swann defines the constitutional duty of school authorities—and the corresponding constitutional right on the part of black children—to include affirmative use of all the techniques of student assignment when necessary in establishing a unitary system of public schools. After what has been said, it is clear that these proposals' attack on "busing" is in fact an attack on the desegregation process itself—an attempt to prevent ultimate vindication of the rights declared in *Brown* almost 18 years ago, by barring use of the necessary tools of desegregation. These assaults on the Fourteenth Amendment collide frontally with the Supreme Court's substantive holding in each of the cases in the *Swann* group.

(1) In *Swann* itself, the Court upheld the desegregation plan accepted by the district judge in that case, a plan that utilized both contiguous and noncontiguous zoning, pairing and clustering of schools, and (in consequence of the rezoning) student transportation. The Fourth Circuit had upset parts of the plan dealing with elementary schools and involving considerable transportation, but the Supreme Court reversed the Circuit Court and approved the plan *in toto*.

(2) In *Davis v. Board of School Commissioners*, 402 U.S. 33, the Court confronted a Fifth Circuit desegregation plan that utilized the techniques of zoning and pairing but was restrained by the "contiguity" requirement, with the result that a number of all-black schools remained in the system. The Court held the plan to be constitutionally insufficient and reversed the Fifth Circuit, stating that "inadequate consideration was given to the possible use of bus transportation and split zoning." 402 U.S. at 38. The Court denounced the contiguity requirement and the notion that neighborhood zoning is *per se* adequate. 402 U.S. at 37. The Court directed lower courts to "consider the use of all available techniques including . . . noncontiguous attendance zones," and reaffirmed the principle that "school authorities should make every effort to achieve the greatest possible degree of actual desegregation." *Id.*

(3) In *McDaniel* v. *Barresi*, 402 U.S. 39, the Court struck down a ruling by the Georgia Supreme Court, which would have barred consideration of the race of children in drawing school attendance lines. The Court noted that affirmative use of pupil assignment techniques is "almost invariably require[d]," and emphasized that a bar on such techniques "would freeze the status quo that is the very target of all desegregation processes." 402 U.S. at 41.

(4) And, in *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, the Court struck down as unconstitutional a North Carolina statute which purported to outlaw affirmative use of pupil assignment techniques, and specifically prohibited student transportation "for the purpose of creating a balance or ratio of race." The Court's reaction to this patently unconstitutional law was expressed by Chief Justice Burger in some of the strongest language available to judges. The attempt to block affirmative assignment techniques, "against the background of segregation, would render illusory the promise of *Brown* v. *Board of Education*"—the law "must inevitably conflict with the duty of school authorities to disestablish dual school systems", by depriving them of "the one tool absolutely essential to fulfillment of their constitutional obligation"—it would "inescapably operate to obstruct" necessary remedies, and thus "contravenes the implicit command of *Green* v. *County School Board* . . . that all reasonable methods be available to formulate an effective remedy." 402 U.S. at 45–46. With respect to

the statutory prohibition of busing for desegregation purposes, the Court specifically noted that "bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it"—the anti-busing provision was denounced because it would "hamper the ability of local authorities to effectively remedy constitutional violations." 402 U.S. at 46. The broad holding of the *North Carolina* case bears restatement in full, for the present anti-busing proposals would have the United States attempt to achieve the unconstitutional aim of the North Carolina statute: . . . [I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees. 402 U.S. at 45.

C. THESE ANTI-BUSING PROPOSALS ARE UNRELATED TO THE EVILS THEY PURPORT TO REMEDY AND ARE UNCONSTITUTIONALLY OVERBROAD

1. Background

After an examination of the pending proposals, the conclusion is inescapable that the draftsmen of all of these bills intended not to bar any level of busing that would have harmful effects on children, but to block any further efforts to enforce *Brown* v. *Board of Education* and to undo some of the present results of those efforts. The conclusion is inescapable because the bills as drafted bear no relation to the harm they assertedly try to prevent, their clearly predictable effect is the prevention of further desegregation and the resurrection of former discrimination, and because there are elements in the bills having nothing to do with the asserted harm but everything to do with the segregatory effect.

The ordinary procedure in drafting a statute is to identify the harms the statute is intended to prevent, to frame the legislation in terms that will eliminate the harm without barring anything good, and to provide sufficient indications in the legislation of exactly what constitutes the harm, so that the executive branch will have guidelines for its administration and the judicial branch will have standards it can use to determine whether the statute has been administered properly.

If a draftsman were actually concerned with the harm caused by excessive busing, rather than with unstated considerations, we could expect to see fairly definite proposals—*i.e.*, maximum time limitations on transportation for students. If there were strong enough evidence that the time spent travelling should be different for different ages, the legislation could take account of such differences. In the case of school districts which already have a substantial degree of busing simply to get students to the closest school, the legislation could take account of this by authorizing a fair amount of increase despite whatever general levels were recommended. It would, in short, be tailored to its purposes. The proposed legislation is quite different.

2. Examples of S. 179 in Operation

1. School District A has never made any efforts to desegregate but could be completely integrated by a pairing or other plan that would require some busing. Even if no student would have to ride for more than ten minutes, S. 179 would prohibit the court from issuing the order.

2. School District B has for years racially gerrymandered its attendance zones so as to minimize integration. The gerrymandering of attendance zones has made it necessary to provide transportation for a substantial number of students. School District B's system has resulted in some downtown white students being bused past their closest schools to attend more distant, predominantly-white schools in the suburbs. Similarly, some outlying black students are being bused past their closest schools to attend more distant, predominantly-black schools downtown. Even if an effective desegregation order would reduce the average time and distance of travel and would cut in half the number of students being transported, S. 179's total prohibition of desegregation-related busing would bar the entry of such an order.

3. School District C is operating under a court order that allows a student of a school at which his or her race is in the majority to transfer to a school at which his or her race is in the minority. A black student wishes to attend a predominantly-white school under this provision, but it's too far for him or her to walk. School District C refuses to provide the necessary transportation, and S. 179 would forbid a Federal court to order compliance with the *existing* transfer provision because of the accidental involvement of transportation.

4. A Federal court has placed School District D under a final desegregation order which requires some busing, but no more than a fifteen-minute ride for any child. The school board announces that it will pursue every possible appeal despite the opinion of the school board's attorney that there are no meritorious grounds for appeal. It further announces that it will fight further because it doesn't believe black and white children should attend the same school under any circumstances. Section 2(c) of S. 179 would require that all parts of the court order would be stayed for the year or more that it would take to exhaust these frivolous appeals.

3. *Examples of S. 287 in Operation*

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4. *Examples of S. 619 in Operation*

1. School District E, in a large urban area, has kept its schools almost entirely segregated by building small schools close together in the heart of each racially identifiable geographic area. For 90% of the students in the school district, both the school closest to their residence and the school next closest to their residence are predominantly attended by students of their own race. For the same 90%, the closest school attended by a substantial number of students of a different race is a bus ride, but no more than a fifteen-minute bus ride, away. Section 203(a) of S. 619 would prohibit a Federal court from ordering any desegregation plan that would affect a single one of these students.

2. School District F, in a large urban area, has built larger schools that serve wider attendance areas than School District E. Just before passage of S. 619, it builds some small schools just within the black residential area, and some schools just within the white residential areas. When a desegregation suit is later brought, S. 619 would have immunized all but these small boundary-line schools from any relief which would involve the transportation of students.

3. School District G is operating under a desegregation plan which provides for majority-to-minority transfers. It refuses to provide transportation to a black student who wishes to transfer to a predominantly-white school three blocks farther away than the two schools closest to his or her residence. Under Section 203(a) of S. 619, a Federal court would be prohibited from ordering compliance with the *existing* transfer plan in such a case.

4. School District H is still largely segregated because it has reinforced the effect of residential segregation by busing 60% of its students to distant schools where their race was in the majority. If this busing were stopped and if the remaining 40% of the students were bused a short distance—but farther that the two schools closest to their residence—the school system would be entirely desegregated. A Federal court would clearly have the power to stop the discriminatory busing, but section 203(a) of S. 619 would bar it from entering the relief necessary to desegregate the 40% of the students who live in residentially segregated areas *even if such remedial busing involved fewer students and shorter trips than the discriminatory busing.*

5. Section 203(a) of S. 619, when read in conjunction with section 301(a) thereof, would allow a Federal court to order the transportation necessary to achieve full compliance with *Brown* in School Districts E, F, G, and H under one condition only: that all students transported under the order, or some source besides the school board, pay the full costs of such transportation. In School District G, a student could exercise his or her majority-to-minority transfer right only if he or she could afford the fee for this exercise of a constitutional right. *Cf. Brewer v. School Board of City of Norfolk, Virginia*, 456. F.2d 943, 946 (4th Cir., 1972), *cert. den.*, 406 U.S. 933 (1972), invalidating a school board's refusal to provide free transportation under its desegregation plan, where the alternative was for each child needing transportation to pay $45 a year to use the local bus system.

6. Metropolitan School District I decides to undo the school district consolidation it had undergone twenty years ago. The result is the resurrection of several small school districts patterned on neighborhood lines. These neighborhoods are racially identifiable now, but most had not been when the original school district lines had been drawn up. The resolution undoing this consolidation states that the primary purpose of the resolution is to ensure future segregation. Since the *lines* of the old school districts had not been drawn for the purpose of segregation, section 204 of S. 619 would prohibit a Federal court from enjoining even such a racially motivated de-consolidation.

7. School District J could desegregate all of its schools by pairing predominantly white schools along one part of a through-town expressway with

predominantly black schools along another part. The predominantly white schools are over four miles from the predominantly black schools, but the transportation on the expressway would take less than fifteen minutes. Desegregation could also be accomplished by transporting students from each set of schools to a third set of racially mixed schools, some of whose students would then have to be bused back to the schools at both ends of the expressway because of problems of capacity. The third set is not on any expressway. The latter plan would require the transportation of more students over a shorter distance (three miles). The trip would take 45 minutes each way, however, because of ordinary traffic. S. 619 would prohibit a Federal court from ordering the first desegregation plan requiring a 15-minute bus ride, but would allow it to order the second plan requiring a 45-minute bus ride, since the third set of schools are the "next closest to his place of residence." In such circumstances, which may exist in any school district with an expressway, S. 619 may result in increasing both the number of students being transported and the time required by the transportation.

8. School Districts K and L were formerly officially segregated. They are identical in every respect, and both have been sued in Federal court after the passage of S. 619. To be desegregated, both require a level of student transportation forbidden by S. 619. The school board of District K goes into court and states that it does not want to resist anyone's constitutional rights and will voluntarily do what the Court thinks best. S. 619 allows the court to order the necessary relief. The school board of District L goes into court and announces that it believes segregation to be morally right and will never obey any court order requiring desegregation. Sec. 205 of S. 619 would prohibit the court from ordering the necessary relief, would authorize the continuance of its segregation, and would thereby reward the school board of District L for its contumacy.

5. *Examples of S. 1737 in Operation*

S. 1737 enshrines freedom-of-choice as a plan of student assignment and withdraws the jurisdiction of Federal courts over a number of areas of discrimination. Under it:

1. Rural School District M has two schools a block apart, one attended by whites and a handful of blacks, and the other attended only by blacks. It is similar to the school district involved in *Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968). Whites in the county have threatened blacks with loss of their jobs and other economic reprisals if they choose to send their children to the white school. The county newspaper has a well-known policy of publishing the names of all black parents who choose to send their children to the white school.[3] The Federal court finds that fear of reprisals will make it impossible ever to desegregate these schools under a freedom-of-choice plan, and further finds that total desegregation could be brought about by a simple "pairing" plan that would not require any change whatsoever in the existing transportation. S. 1737 would prohibit the Federal court from ordering this remedy.

2. School District N adopts a policy whereby it will only enter into contracts with white teachers for teaching at predominantly-white schools, and will only enter into contracts with black teachers for teaching at predominantly-black schools. S. 1737 would prohibit the Federal court from enjoining this segregation of faculty members.

3. Small-town School District O operates a rundown school, without indoor plumbing, for black students. It could not be put into good repair without prohibitive expense, and no white students would accept a transfer there. To avoid such a transfer, their parents would start a private segregated academy in the basement of the local church. There is adequate space for all of the black students in a brand new, predominantly-white school within walking distance. The existing student assignment system is based on geographic attendance areas which have been racially gerrymandered. S. 1737 would prohibit the Federal court from ordering the closing of the inferior black school and the transfer of its students to the predominantly-white school.

4. Metropolitan School District P has been sued after the passage of S. 1737 in an effort to desegregate its schools. The Federal court agrees with the educational experts of both the school board and the plaintiffs that the most effective desegregation plan would require only the "pairing" of various schools and would cause only a 5% increase in transportation. The school board advises

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[3] Such practices were common, and the fear of such practices deterred many black families from sending their children to the "white" schools. U.S. Commission on Civil Rights, *Southern School Desegregation, 1966–1967* (1967). See the Commission's Findings, at pp. 87–88.

the court that a freedom-of-choice plan would result in substantial numbers of students changing schools simply because of the relative prestige of the schools' athletic teams, the availability of certain extracurricular activities, and other reasons having nothing to do with either education or desegregation. The school board estimates that its transportation costs might triple under a freedom-of-choice plan that might not even result in desegregation. In addition, it will cost the school district over $20,000 to sort out, by computer, all the first, second and third choices of the more than 35,000 students in the school system. It has not been able to estimate the costs of getting each child's records to the appropriate schools. The school board urges the court to accept the experts' plan, since it would be an inexpensive one-time adjustment. A group of white parents move to intervene in the case, praying that S. 1737 be enforced. If enforced, it would forbid the court from ordering the school-pairing plan, and require approval of the freedom-of-choice plan.

6. Examples of S. 2555 in Operation

S. 2555 would enshrine a neighborhood school policy as immune from challenge, and would prohibit a Federal court from requiring "the assignment or transportation of students or teachers . . . in order to carry out a plan of racial desegregation . . . except on the express written voluntary request" of local school officials. Its operation would be similar to the operation of S. 179, S. 619 and S. 1737, but in a harsher form. Section 4 of S. 2555 would not even authorize a Federal court to order a school board to obey its own freedom-of-choice plan, in the event that some blacks chose to go to a white school under the plan.

S. 2555 is unique, among these proposals, for its failure to attempt to restrict the powers of Federal courts to enforce 14th Amendment rights on their own. It applies only to Federal statutes "providing for an applicable educational program."

7. These Proposals Are Unconstitutionally Overbroad[4]

Since these proposals affect fundamental rights, the constitutional standard by which they must be judged is that enunciated in *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960):

"But governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance. When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification."

And again, in *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (footnotes omitted):

"In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, the purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."

In *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963), the Court stated: "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

And yet again, in *United States* v. *Robel*, 389 U.S. 258, 265 (1967): "When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated."

There, the statute was invalid because Congress could have used "less drastic" means of achieving a valid legislative goal. 389 U.S. at 268. Similarly, in *Dean Milk Co.* v. *City of Madison, Wisconsin*, 340 U.S. 349, 354 (1951), the Court struck down an overbroad milk inspection ordinance, since "reasonable alternatives", having a lesser impact on interstate commerce, were available.

Under these standards, the proposed bills could not possibly survive constitutional scrutiny. There is little room for doubt that they fall fatally short of "the exacting standard of precision we require of statutes affecting constitutional rights". *Dunn* v. *Blumstein*, 405 U.S. 330, 360 (1972). While purporting to be aimed at "excessive" or "harmful" levels of busing or at "overly disruptive" methods of desegregation, they make no serious effort to deal with such limited evils. Instead, their blunderbuss approach serves their real—as opposed to stated—purpose, which is the barring, in most cases, of all meaningful desegregation, even to the extent of effectively barring an individual's voluntary majority-to-minority transfer. As such, they stand on no better constitutional footing than the "massive resistance" legislation passed by some States in bygone years.

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[4] This overbreadth analysis applies to S. 179, S. 619 and S. 1737, but not to S. 287 or S. 2555.

D. PROVIDING AN AUTOMATIC STAY OF COURT ORDERS PENDING EXHAUSTION OF ALL APPEALS VIOLATES THE CONSTITUTION

Section 2(c) of S. 179 would postpone the effectiveness of any Federal court order which has the effect of requiring student transportation for the purpose of desegregation. This provision would apply whether the grounds for the appeal were frivolous or meritorious, and would apply equally to cases in which the transportation involved is on a minor level and to cases in which much greater levels of transportation would result. It would apply equally to cases in which no other form of relief would be effective, and to cases where alternative forms of relief, not resulting in transportation, are available. Its one constant feature is that it could delay the implementation of a desegregation order for a year or more.

Such a broad measure obviously has the same problems of unconstitutional overbreadth that are discussed above. It also violates the Supreme Court's express command that there be no further delay in the dismantling of dual school systems. As early as 1964, the Supreme Court announced that the period in which the right to a desegregated education could be suspended had come to an end:

> "The time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia."

Griffin v. *County School Board of Prince Edward County*, 377 U.S. 218, 234 (1964). The Court reiterated this point the next year. In *Bradley* v. *School Board of the City of Richmond*, 382 U.S. 103, 105 (1965), it stated, "Delays in desegregating school systems are no longer tolerable." Three years later, the Supreme Court again held that these rights could no longer be suspended: "The burden on a school board today is to come forward with a plan that promises to work, and promises realistically to work now." *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 439 (1968).

In October, 1969, the Supreme Court again held that the constitutional right to an integrated education could no longer be delayed, but had to be enforced fully and immediately:

> "The question presented is one of paramount importance, involving as it does the denial of fundamental rights to many thousands of school children who are presently attending Mississippi schools under segregated conditions contrary to the applicable decisions of this Court. Against this background the Court of Appeals should have denied all motions for additional time because continued operation of segregated schools under a standard of allowing "all deliberate speed" for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."'

Alexander v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969). A month and three days later, the Fifth Circuit Court of Appeals authorized a one-semester delay in the full integration of the student body in a number of school districts, although it ordered the complete and immediate integration of faculty, staff, etc. *Singleton* v. *Jackson Municipal Separate School District*, 419 F. 2d 1211 (1969). Under the name of *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970), the Supreme Court reversed the *Singleton* decision six weeks after it was entered. Justices Harlan and White, in a concurring opinion, stated that they understood *Alexander* to require that, upon a *prima facie* showing of continued segregation, ". . . plaintiffs may apply for immediate relief that will at once extirpate any lingering vestiges of a constitutionally prohibited dual school system.

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> "*Alexander* makes clear that any order so approved should thereafter be implemented in the minimum time necessary for accomplishing whatever physical steps are required to permit transfers of students and personnel or other changes that may be necessary to effectuate the required relief."

396 U.S. at 292, 293. Referring to two other cases, Justices Harlan and White continued: ". . . this would lead to the conclusion that in no event should the time from the finding of noncompliance with the requirements of the *Green* case to the time of the actual operative effect of the relief, including the time for judicial approval and review, exceed a period of approximately eight weeks. This, I think, is indeed the "maximum" timetable established by the Court today for cases of this kind."

396 U.S. at 2933. Justices Black, Douglas, Brennan and Marshall expressly disagreed with the conclusion of Justices Harlan and White that an eight weeks' delay in full integration would be permissible: ". . . those views retreat from our holding in *Alexander* v. *Holmes County Board of Education*, 396 U.S., at 20, 90 S.Ct., at 29, that 'the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.' "

A blanket authorization of further delay, unrelated to any question of need for such delay, is in clear conflict with the last ten years of the Court's controlling constitutional decisions.

E. REQUIRING PROOF OF ACTUAL DISCRIMINATORY MOTIVATION FOR VARIOUS ACTS BEFORE THEIR RACIALLY DISPARATE EFFECTS CAN BE REMEDIED IS UNCONSTITUTIONAL BECAUSE IT IS FUNCTIONALLY THE SAME AS IMMUNIZING SUCH ACTS FROM JUDICIAL REVIEW

Section 101 of S. 619 provides that a neighborhood school policy "is not a denial of equal protection of the laws unless such assignment is made for the purpose of segregating students on the basis of race, color, sex, or national origin." Section 204 of S. 619 provides that school district boundaries "shall not be ignored or altered except where it is established that the lines were drawn for the purpose of segregating children among public schools on the basis of race, color, sex, or national origin." Section 3 of S. 2555 provides that nothing in any statute providing for an applicable educational program shall be construed as requiring any school district "which assigns students to schools on the basis of geographic attendance areas drawn on a racially nondiscriminatory basis to adopt any other method of student assignment."

These proposals capitalize upon the difficulty of proving an actual racially discriminatory motivation for a given act. The impossibility of proving an actual intent to discriminate, it must be remembered, is what led Congress to enact § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1937c, requiring covered States and subdivisions to submit changes in voting qualifications, practices and laws to the Attorney General for approval before being placed in effect. See *South Carolina v. Katzenbach*, 383 U.S. 301, 328, 335 (1966). Court after court has recognized the difficulty of proving that an employer had a specific racially discriminatory motivation when it instituted an educational requirement, testing system, seniority system or other practice that seriously disadvantaged blacks or females, and have held that proof of such a specific intent to discriminate is not essential to establish a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* It is sufficient to establish that a given practice substantially disadvantages minorities, and that it is not required by business necessity. *E.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). "Courts have often observed that proof of racial discrimination in employment is seldom direct." *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382 (4th Cir., 1972), *cert. den.*, 409 U.S. 982 (1972).

Here, the seeming intent of these provisions is to divide into two classifications all cases in which such State or school district practices have a strongly segregative effect. Relief would be restricted to those few cases in which specific illegal intent can be shown or inferred. In the vast majority of such cases where there will be, for example, no school board minutes discussing the racial reasons for adopting a particular set of attendance zone boundaries, relief would be denied. Even if it could be shown that the particular decisions in question are clumsier and costlier than alternative arrangements which are sounder educationally and have a substantially lesser segregative impact, relief would be denied. Because of the difficulties of proof, the effect of these provisions would be to immunize from judicial redress the majority of even those practices adopted for the purpose of discrimination.

Since these provisions would affect the enjoyment of fundamental rights, it is clear that such a classification would violate the Constitution unless it served a "compelling" governmental interest. *E.g., Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). Where the segregative impact is the same in both situations, and where the specific practice in question cannot be shown to serve some educational necessity that would not be served by a less segregative practice,[5] a classification based upon the presence or absence of a showing of specific discriminatory intent would flunk the "reasonable relationship" test, let alone the "compelling interest" test. Accordingly, these proposals violate the Constitution.

F. PROVISIONS WHICH DIRECTLY OR INDIRECTLY MAKE THE AVAILABILITY OF ESSENTIAL TYPES OF RELIEF TURN UPON THE VOLUNTARY ACTS OF A SCHOOL DISTRICT VIOLATE THE CONSTITUTION BY CONDITIONING FUNDAMENTAL RIGHTS ON PURELY ARBITRARY DECISIONS OF LOCAL OFFICIALS

Section 205 of S. 619 provides that a school district may propose, adopt, require or implement a school desegregation plan incorporating forms of relief which S. 619 forbids a Federal court to order, and further provides that a Federal court may approve such relief if "voluntarily proposed" by the school district. Section 4 of S. 2555 allows the assignment of students or teachers pursuant to a desegregation plan *only* on the "express written voluntary request" of school officials.[6] While S. 179 and S. 1737 do not in terms state an exception for such voluntary obedience to the Constitution, they limit only the actions of Federal courts and agencies. As a practical matter, they too allow school districts to obey the Constitution voluntarily.

For the purposes of constitutional analysis, each of these bills stands on the same footing. Each thus runs afoul of perhaps the two most frequently enforced constitutional principles: that legislative classifications affecting fundamental rights serve some compelling interest, *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960),[7] and that the enjoyment of constitutional rights cannot be made to turn upon arbitrary decisions.

These proposals seek to divide all black school children into two classes: those attending school in school districts which wish to obey the Constitution, and those attending school in districts that prefer to continue each of the remaining vestiges of discrimination, the elimination of which would require some relief proscribed to a Federal court. The consequence of what district a black child attends is severe: in the first, he will obtain full and immediate enjoyment of his constitutional rights; in the second, his rights will be suspended for a year or, perhaps, be lost altogether.

The only difference that accounts for such a total disparity in the enjoyment of a constitutional right is the choice of the school board. None of these bills establishes any standards for a school board to follow in deciding how to exercise its choice: *a decision based upon whim or caprice, or based upon the sentiment that black children are inherently inferior, is fully acceptable under each of these bills.* The children in both types of school systems are equally entitled to redress, and any legislative scheme that conditions the enjoyment of constitutional rights on so unprincipled a pivot must fall. The language of the Court in *Yick Wo v. Hopkins*, 118 U.S. 356, 366–67 (1886) is telling. The ordinances in question, said the Court, ". . . seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent . . . The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

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[5] *Cf. Dunn v. Blumstein, supra*, 405 U.S. at 343: "In pursuing [an important state] interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision' . . . and must be 'tailored' . . . to serve their legitimate objectives. . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all it must choose 'less drastic means.' " (Citations omitted.)

[6] A prohibition of a school district's voluntary actions to desegregate would have been even more glaringly unconstitutional. See *North Carolina State Board of Education v. Swann, supra*, 402 U.S. at 45: "However, if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees."

[7] This is especially true where, as here, the legislation gives local school districts the option to maintain their classification of students based on race. A long line of Supreme Court decisions have held such classifications to be inherently "constitutionally suspect", and subject to the "most rigid scrutiny". ***E.g., McLaughlin*** v. ***Florida***, 379 U.S. 184, 192 (1964); ***Bolling*** v. ***Sharpe***, 347 U.S. 497 (1954); ***Korematsu*** v. ***United States***, 323 U.S. 214, 216 (1944); ***Anderson*** v. ***Martin***, 375 U.S. 399 (1964); ***Watson*** v. ***City of Memphis***, 373 U.S. 526 (1963).

And, at 369–70: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." *Accord, e.g.; Gulf. C. & S. F. Ry. Co. v. Ellis*, 165 U.S. 150, 155, 159–60 (1897); *McLaughlin v. Florida*, 379 U.S. 184, 190–91 (1964).

The conclusion of the Supreme Court in striking down the San Francisco ordinance serves as well to indict the "free will" classification of these bills: ". . . [I]n the famous language of the Massachusetts bill of rights, the government of the commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo, supra*, 118 U.S. at 370.

G. THE "FINDINGS" STATED IN S. 619 WILL NOT RENDER THE PROVISIONS OF THE BILL CONSTITUTIONAL

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II. THE ENFORCEMENT CLAUSE OF THE FOURTEENTH AMENDMENT GRANTS CONGRESS NO LICENSE TO AUTHORIZE VIOLATIONS OF FOURTEENTH AMENDMENT RIGHTS OR TO DEFEAT THEIR ENFORCEMENT

Section 5 of the Fourteenth Amendment says in its entirety: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Since the pending bills attempt to bar the enforcement of judicially-defined rights,[8] the position of their proponents has to be that the congressional power to enforce under section 5 includes the power to define a lesser duty to desegregate than that contemplated by the courts, and thereby to authorize and to legalize a school district's nonconformity with judicially-declared standards. Stripped to essentials, their argument must be that the section 5 power to enforce includes the power to repeal constitutional pronouncements of the Supreme Court with respect to this Amendment.

The identical argument had been raised in Congress in support of proposals to bar implementation of the Supreme Court's reapportionment decision in *Reynolds* v. *Sims*, 377 U.S. 533 (1964). Evaluating its merit, Associate Dean Robert McKay of New York University Law School wrote:

"[T]o describe the proposal as an exercise of congressional power to enforce or implement the protections of the fourteenth amendment is surely a perversion of plain meaning that should not be tolerated. The whole proposal was thus infected with serious doubt as to its constitutionality." "Court, Congress, and Reapportionment," 63 Mich. L. Rev. 255, 273 (1964).

In light of the cases decided by the Supreme Court since the end of the Civil War, the Administration's assertions of the right to restrict the judicial implementation of Fourteenth Amendment rights by legislative fiat is astounding. If such power existed—under § 5 of the Fourteenth Amendment or under the Article III power of Congress to "ordain and establish" inferior courts—the Fourteenth Amendment would stand on no firmer ground than on ordinary statute, susceptible to day-to-day legislative change in accordance with the political winds of the moment.

The deepest purpose of a written constitution is that it sets limits to the powers of each branch of government, and the notion of a Congressional power to authorize conduct violating its prohibitions is incompatible with that purpose. Fourteen years after the ratification of the Constitution, Chief Justice Marshall reached the same conclusion:

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[8] When the Administration's 1972 anti-busing proposals were before Congress, the Administration defended their constitutionality by asserting that the proposals did not restrict 14th Amendment rights, merely the remedies for these rights. It is inescapable, however, that the prohibition of essential remedies will allow school districts to retain some of the vestiges of officially-imposed segregation. It would balk at reality to state that such an authorization of continued segregation has no effect on 14th Amendment rights.

"The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

"Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

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"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void."

Marbury v. *Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). Justice Brandeis' historic dissent in *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928) is equally valid as a warning against every effort to bar by indirection the practical implementation of the Constitution: "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Each of the Civil War Amendments has an Enforcement Clause nearly identical in language to that of § 5,[9] and they have all been interpreted similarly, both by Congress and by the courts. Despite many politically unpopular decisions construing rights under the Civil War Amendments, Congress has never, in the hundred years since their passage, attempted to use its "power to enforce" the provisions of any of these amendments in order to restrict the scope of judicially-declared rights thereunder. This long-standing practical construction of its powers by Congress must be taken into consideration. More directly, the Supreme Court has construed the Enforcement Clause of the Eighteenth Amendment to preclude the construction urged by the Administration: "The second section of the amendment—the one declaring 'The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation'—does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means." *Rhode Island v. Palmer*, 253 U.S. 350, 387, 40 S. Ct. 486, 488 (1920). That amendment also granted enforcement power to the States. In *McCormick v. Brown*, 286 U.S. 131, 143–44 (1932), the Court held again that "state legislation cannot give validity to acts prohibited by the Eighteenth Amendment. . . .'

Seven of the Justices presently sitting on the Court—a clear majority—have already expressed their view that the Enforcement Clauses of the Civil War Amendments give Congress no power to dilute judicially-declared rights thereunder.

In *Katzenbach v. Morgan*, 384 U.S. 641, 651 n. 10 (1966), Justice Brennan wrote: ". . . § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws."

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[9] 13th Amendment, § 2: "Congress shall have power to enforce this article by appropriate legislation."

14th Amendment, § 5: "The Congress shall have power to enforce by appropriate legislation the provisions of this article."

15th Amendment, § 2: "The Congress shall have power to enforce this article by appropriate legislation."

Only two Justices dissented from the decision; all others joined the majority opinion in all or most of its respects, including this point. The majority on this point thus included Justices Brennan, White, and Douglas.

In *Oregon v. Mitchell*, 400 U.S. 112 (1970), Justice Brennan again made the same point. 400 U.S. at 249 n. 31. He was joined by Justice White and Marshall. Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, held that Congress has a general legislative power under § 5 to protect Fourteenth Amendment rights, and went on: "But even though general constitutional power clearly exists, Congress may not overstep the letter or spirit of any constitutional restriction in the exercise of that power. For example, Congress clearly has power to regulate interstate commerce, but it may not, in the exercise of that power, impinge upon the guarantees of the Bill of Rights." 400 U.S. at 287. The late Justice Black had reached the same conclusion: "Congress may only 'enforce' the provisions of the amendments and may do so only by 'appropriate legislation.' Congress has no power under the enforcement sections to undercut the amendments' guarantees of personal equality and freedom from discrimination, see *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 n. 10, 86 S. Ct. 1717, 1728, 16 L.Ed. 2d 828 (1966), or to undermine those protections of the Bill of Rights which we have held the Fourteenth Amendment made applicable to the States." 400 U.S. at 128–29 (footnote omitted).

The purpose of the enforcement clauses are well illustrated by a consideration of the legality of literacy tests for voter registration. In *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45, 51–53 (1959), the Court held unanimously that, absent proof of discriminatory administration, North Carolina's literacy test for voting did not violate the Fourteenth or Fifteenth Amendments. Then the Voting Rights Act of 1965 was passed, and Congress suspended *all* literacy tests in the areas covered by the Act, based upon evidence of discriminatory administration in *some* areas. § 4(a) of the Act, 42 U.S.C. § 1973 b(a). When the Act was challenged, the Supreme Court held that an across-the-board suspension, even without prior adjudication of a particular test's invalidity because of discriminatory administration, was appropriate legislation to "enforce" the Fifteenth Amendment. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 333–34, 337 (1966). The ban on literacy tests was extended nationwide by the Voting Rights Amendments of 1970. § 201 of the amended Act, 42 U.S.C. § 1973aa. This too, was upheld under the enforcement clause of the Fifteenth Amendment and, for Justice Douglas, the enforcement clause of the Fourteenth Amendment. *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

The impact of the § 5 power upon the scope of Fourteenth Amendment rights here is clear. In an area which the Court had refused to enter because of the limitations on its decision-making power, the enforcement clause gave Congress the power to define new rights, and to provide new means of effectuating old rights—as by requiring the submission of changes in voting requirements and practices to be submitted to the Attorney General before taking effect, in order to protect the existing, judicially-declared right to freedom from discriminatory obstacles to voting.

This is in accord with the time-honored understanding of Congress' enforcement clause powers:

"Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation, is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." *Ex parte Virginia*, 100 U.S. 339, 345–46 (1880) (emphasis in original).

I. THE CONGRESSIONAL POWER OVER THE JURISDICTION OF FEDERAL COURTS CANNOT BE USED TO DEFEAT 14TH AMENDMENT RIGHTS[10]

1. Background

The above discussion makes it clear beyond dispute that the provisions of S. 179, S. 619 and S. 1737, viewed in themselves, are unconstitutional. It is also beyond dispute that they are not saved from unconstitutionality by the presence or absence of a statement of "findings" or by reliance on the power of Congress to enforce the 14th Amendment by "appropriate legislation". The remaining question is whether, under the Constitution, Congress is permitted to achieve the very same unconstitutional result through indirection and legerdemain—by legislation designed to hamper the enforcement powers of the Federal courts. The proponents of this legislation are forced to argue that Congress has the power to make such "exceptions" to the Supreme Court's appellate jurisdiction under Article III, section 2, and the power to vest the lower Federal courts with such jurisdictional powers, as Congress sees fit. They are then further forced to argue that this power can be exercised so as to repeal or modify at will any judicially declared constitutional right. Such a contention is profoundly anti-constitutional. Our constitutional scheme commits to the nation's judiciary the final power to interpret the fundamental law, saving always the power of constitutional amendment through prescribed procedures. To assert a legislative power of nullification over the constitutional decisions of the Supreme Court, is to pose a blatant challenge to the fundamental principle of separation of powers. Such unfettered power would altogether subvert judicial supremacy in declaring the law of the Constitution—indeed, it would subvert the very institution of a written constitution that is supreme law unless modified through the amendment process.

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[10] Most of this part of this memorandum is taken from a 1972 memorandum written by Lewis D. Sargentich in response to the Administration's 1972 antibusing proposals.

There are few authoritative pronouncements by the courts that serve to define the limits upon congressional power to regulate the jurisdiction of Federal courts, and this is no wonder. Congress has never attempted what these proposals aim at achieving—that is, there has never been a law passed that expressly singles out a class of constitutional rights lying within the core purpose of a constitutional provision, and seeks systematically to bar judicial enforcement of the rights selected.

"Congress has never . . . actually sought to push its authority over jurisdiction so far. The basic jurisdictional statutes actually enacted have allowed the judges to carry on their essential review functions with reasonable effectiveness. . . . The organic power vested in the Congress over the competence of the judicial department does not enable it to act in a manner that would, in effect, negate all judicial authority to vindicate constitutional rights."

B. Schwartz, I *A Commentary on the Constitution of the United States: The Powers of Government* 365 (1963). The anticonstitutional nature of such legislation should be enough to cause its rejection by the Congress—it always has been enough in the past. The unconstitutional nature of such legislation would, in any event, cause its denunciation and invalidation by the courts.

2. The Historic Primacy of the Federal Courts in Enforcing 14th Amendment Rights

The inevitable challenge to the principle of separation of powers, posed by any legislation aimed at curtailing the enforcement powers of courts in constitutional cases, is immeasurably heightened in the present context by virtue of the unique role of federal courts in enforcing Fourteenth Amendment rights. The proposed legislation would have the Congress turn its back on a hundred years' tradition of expanding federal jurisdiction to enforce constitutional rights—disregard the vital necessity that claimants within the special protection of the Fourteenth Amendment have continued access to the full panoply of remedies ordinarily available in federal courts—and intervene to restrict the courts in their uncompleted task of implementing the fundamental principles of *Brown*.

It is highly significant that the great expansion of the jurisdiction of federal courts came in the period immediately following the Civil War. "[A]fter the Civil War . . . the basic change was made whereby the national courts became the primary forum for the vindication of federal rights. . . . Congress freely invoked the federal courts to secure the Negroes newly granted civil rights, and there was enacted a series of jurisdictional provisions most of which have lasted to this day." Hart & Wechsler, *The Federal Courts and the Federal System* 727–729 (1953). The Civil Rights Act of 1871 enacted a general cause of action for civil rights deprivations by state officials, and the Congress vested original jurisdiction of such claims in the federal courts—school desegregation cases today are tried under the provisions of that legislation. Four years later the federal courts were given original jurisdiction over all cases (beyond a certain dollar amount) involving claims under federal law. Thus there emerged the modern judicial system under which "the federal courts are the primary guardians of constitutional rights," and it remains "a principal function of the federal courts to vindicate the constitutional rights of all persons." *Perez v. Ledesma*, 401 U.S.

82, 118–119 (1971) (concurring opinion). See also *Zwickler v. Koota*, 389 U.S. 241, 247 (1967); *McNeese v. Board of Education*, 373 U.S. 668, 672–674 (1963).

The core purpose of the Equal Protection Clause is to protect black citizens of this nation against continued denial of equal status and dignity—"to take away all possibility of oppression by law because of race or color." *Ex Parte Virginia*, 100 U.S. 339, 354 (1880). Indeed, so clear was the guiding spirit and purpose of the Clause that the Supreme Court remarked in 1873: "We doubt very much whether any action of a State not directed by way of discrimination against the Negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 410. The prophecy proved empty, but it remains that any attempt to legislate against full vindication of the Fourteenth Amendment Rights of black school children must be seen as striking at the heart of the Amendment. The primary intended beneficiaries of the Amendment are a racial minority stigmatized and oppressed for centuries and unlikely to prevail in majoritarian institutions such as legislatures or school boards—the Equal Protection Clause, seen as a limit on abuses of majoritarianism, is nugatory absent vigorous enforcement by the courts. "[U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." *NAACP v. Button*, 371 U.S. 415, 430 (1963).

The whole history of school desegregation shows the vital and unique constitutional role of federal equity courts in implementing the command of *Brown v. Board of Education*. In *Brown II* the Supreme Court decided not to exercise its own power to frame a decree giving detailed relief, but rather remanded the cases to the district courts with instructions "to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. . . . [The lower courts shall] consider the adequacy of any plans the defendants may propose . . . to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases." *Brown v. Board of Education*, 349 U.S. 294, 299–301 (1955). Numerous times during the ensuing decade and a half the Supreme Court had occasion to underscore the intense responsibility of the courts in school desegregation cases—". . . if Negro children of school age were to receive their constitutional rights as we had declared them to exist, the coercive assistance of courts was imperatively called for." *United States v. Montgomery County Board of Education*, 395 U.S. 225, 228 (1969). As a direct result of *Brown II* the district courts "were invested with a discretion appropriate to ultimate fashioning of detailed relief . . ." *Watson v. City of Memphis*, 373 U.S. 526, 531 (1963)—the power of the lower courts, under the broad mandate of *Brown II*, was held to include if necessary an order directing school authorities to reopen schools they had closed and to levy taxes to support public education. *Griffin v. County School Board*, 377 U.S. 218, 233 (1964).

The decision of *Brown II* to tolerate some delay in according full constitutional relief entailed a unique commitment of the federal judiciary to the process of bringing dual school systems into compliance with the Constitution. In time the constitutional command came to be articulated in terms of the right to call upon the enforcement powers of the courts. In 1969 the original all-deliberate-speed standard was held "no longer constitutionally permissible." *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969), and expedited procedures to ensure full relief were held mandatory: "plaintiffs may apply for immediate relief that will at once extirpate any lingering vestiges of a constitutionally prohibited dual school system . . . Such relief shall become effective immediately after the courts, acting with dispatch, have formulated and approved an order that will achieve complete disestablishment of all aspects of a segregated public school system." *Carter v. West Feliciana Parish School Board*, 396 U.S. 290, 292 (1970) (concurring opinion).

The affirmative duty doctrine, which is primarily a formulation of the constitutional obligations of school officials, was also articulated in terms of the enforcement duties of the federal courts. "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. *Louisiana v. United States*, 380 U.S. 145, 154 (1965), quoted in *Green v. County School Board*, 391 U.S. 430, 438 n. 4. (1968).

Recently in the *Swann* case, Chief Justice Burger reemphasized the fundamental role of their courts: "In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system." At 1276. And in the *Swann* cases the Court twice stated (in identical language) that "The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation . . ." *Swann* at 1281; *Davis v. Board of School Commissioners*, 91 Sup. Ct. at 1292.

3. Constitutional Limitations on the Power of Congress to Regulate the Jurisdiction of the Federal Courts

The congressional power to regulate jurisdiction "is not, of course, unlimited." *Glidden Company v. Zdanok*, 370 U.S. 530, 568 (1962) (Harlan, J.). For example, no one would suggest that Congress could bar black litigants from federal court solely on account of their race. More broadly, it cannot be supposed, consistently with the doctrine of separation of powers and judicial supremacy in interpreting the law of the Constitution, that the power to regulate jurisdiction may be used for the purpose of defeating constitutional rights declared by the highest court.

"The power vested in Congress over the jurisdiction of the judicial department may not . . . be employed so as to destroy rights guaranteed by the Constitution itself. The Congressional authority to prescribe the rules by which judicial competence is to be governed must be limited to such rules as do not completely eliminate the essential function of the courts in vindicating the rights guaranteed by the basic document. To hold otherwise would be to give the legislative department an all too easy way to circumvent the supreme law. It can scarcely be supposed that the Framers, concerned as they so clearly were with the danger of legislative dominance in the governmental structure they were creating, intended to give Congress what amounts to the power to render organic rights unenforceable in its discretion. To push the Congressional power to withhold jurisdiction to the extreme of permitting constitutional rights to be made completely unenforceable would be to read the basic document as authorizing its own destruction." B. Schwartz, I *A Commentary on the Constitution of the United States: The Powers of Government* 361 (1963).

"An 'impenetrable bulwark' against Congressional oppression [as Madison called the Bill of Rights] that could easily be flanked by Congressional withdrawal of jurisdiction from the courts would be no bulwark at all." R. Berger, *Congress versus The Supreme Court* 294–95 (1969).

Spokesmen for broad congressional power over jurisdiction often invoke *Ex Parte McCardle*, 7 Wall. 506 (1869), involving a statute withdrawing Supreme Court appellate jurisdiction in *habeas corpus* cases. The Court pronounced this "exception" to its jurisdiction valid and dismissed McCardle's appeal, thus acquiescing momentarily in the congressional desire to prevent the Court from deciding the validity of Reconstruction legislation attacked by McCardle. Yet it would be incorrect to read the case as establishing unfettered congressional power to prevent the Court from adjudicating constitutional claims. The Court retained the power to issue *habeas corpus* as an original matter—thus withdrawal of appellate jurisdiction merely closed one avenue, but did not bar access to the Court altogether, and the power to resolve the substantive issues raised by McCardle remained intact. See *Ex parte Yerger*, 8 Wall. 85 (1869). In any event the *McCardle* case lacks progeny, and has been criticized in recent years, see *Glidden Company v. Zdanok*, 370 U.S. 530, 605 n. 11 (1962) (Douglas, J., dissenting). The authority of *McCardle* is attenuated by the historical context in which the decision was rendered—the opinion recites that argument in the case was delayed because the impeachment trial of President Johnson required the presence of the Chief Justice—it was a time, in short, when separation of powers was a dangerous doctrine to invoke. There is little doubt that the more enduring principle is that of *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816), one which strains to protect the primacy and integrity of the Supreme Court against encroachment.

Apart from *McCardle* there is a dearth of authority supporting congressional power to hamper the courts in enforcing the Constitution. The wartime price control legislation barred the district courts from adjudicating the validity of price regulations, but the same legislation provided a special court to adjudicate these controversies, with review in the Supreme Court—the legislation was upheld because it preserved a fair and effective remedy for litigants in a federal judicial forum. See *Yakus v. United States*, 321 U.S. 414 (1944), and *Lockerty v. Phillips*, 319 U.S. 182 (1943). The Norris-La Guardia Act, 29 U.S.C. §§ 101–115, bars the federal courts from issuing injunctions in certain labor disputes, through a declaration that federal judges have no "jurisdiction" to issue such relief. The Act was of course upheld—but this statute simply declares the public policy of the United States on a nonconstitutional matter, and does not purport to deny litigants injunctive relief to redress constitutional violations. The "Portal-to-Portal" Act came after the Supreme Court had construed the Fair Labor Standards Act in a novel manner, giving rise to enormous claims for back pay; the Congress responded by changing the law and denying "jurisdiction" to enforce the broader liability. The Act was upheld in the lower courts, but not on the theory that Congress has unfettered power to interfere with the course of judicial decision-making.

> "We think . . . that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation."

Battaglia v. General Motors Corp., 169 F. 2d 254, 257 (2d Cir. 1948), *cert. denied*, 335 U.S. 887 (1948). It it the Fifth Amendment, of course, through which the Equal Protection Clause is enforced against the federal government. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

In the situations mentioned the exercise of congressional power to control jurisdiction was upheld, but in no case did the extraordinary legislation involved single out a class of constitutional rights and purport to foreclose effective judicial enforcement. See generally B. Schwartz, *supra*, at 356–65. Yet this is virtually the sum of judicial authority available to spokesmen for the proposed legislation. The field of administrative law presents situations in which the timing and scope of judicial review is limited by statute, but courts have been alert to defend the principle of judicial primacy in deciding matters of law and in controlling the administrative fact-findng process. See, *e.g.*, *Crowell v. Benson*, 285 U.S. 22 (1932). When statutes have attempted to oust the courts, in whole or significant part, from exercising control over administrative lawlessness, the statutory restrictions have been brushed aside in order to accord constitutional claims a meaningful judicial hearing. See *Oestereich v. Selective Service System*, 393, U.S. 233 (1968); *Wong Wing v. United States*, 163 U.S. 228 (1896). The broad principle of these cases is relevant in the present context, for the proposed legislation attempts to commit the constitutional rights of black school children to the uncontrolled discretion of the very administrative authorities—state and local school officials—responsible for violating the Constitution in the first place.

To be sure, Supreme Court opinions acknowledge a broad power on the part of Congress to allocate the judicial business of the United States between state and federal courts. Congress has the power to impose restrictions on federal diversity-of-citizenship jurisdiction, see *Sheldon v. Sill*, 8 How. 440 (1850), when the result is simply that the controversy be tried in state court. Moreover, "Congress could, of course, have routed all federal constitutional questions through the state court systems, saving to this Court the final say when it came to review of state judgments." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). As noted above, it was not until after the Civil War that broad "federal question" jurisdiction was lodged in federal courts. But these facts about congressional power over jurisdiction in no way support the view that Congress may legislate to prevent effective enforcement of constitutional rights. Remitting a class of cases to state courts, while preserving Supreme Court appellate review, is in harmony with the requirement of effective judicial enforcement. In fact, in circumstances where state law does not adequately accommodate constitutionally protected interests, and federal courts may not be available to the claimant, the Supreme Court has held that state courts may be required to create a special remedy, not otherwise available at state law, in order to vindicate constitutional rights. *Ward v. Love County*, 253 U.S. 17 (1920); see *General Oil Company v. Crain*, 209 U.S. 211 (1908).

4. The Fourteenth Amendment Rights Challenged by S. 179, S. 619 and S. 1737 Would Not Be Available Through the State Courts

It is evident that the proposed legislation is not simply a remitting of Fourteenth Amendment suitors to state courts, preserving the Supreme Court's power to review state court judgments in school desegregation cases and to command effective relief. First, *all* federal courts—including the Supreme Court—would be barred from ordering the full relief required by the Constitution. The Supreme Court would be required to affirm, or decline to review, constitutionally inadequate judgments of state courts. Such an ousting of unifying Supreme

Court review is a direct challenge to "the essential role of the Supreme Court in the constitutional plan." Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts," 66 Harv. L. Rev. 1362, 1365 (1953). In *General Oil, supra* at 226, the Court noted that "without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution, and the Fourteenth Amendment, which is directed at state action could be nullified as to much of its operation". Such a result was decided to be intolerable, and was rejected by the Court.

Besides the deprivation of Supreme Court review, yet another feature of these three bills guarantees that Fourteenth Amendment rights will not be effectuated through State courts. S. 179, S. 619 and S. 1737 leave intact the original subject matter jurisdiction of the Federal courts in school desegregation cases, and presume to restrict only their enforcement powers. These bills also leave intact the general removal statute, 28 U.S.C. § 1441, which provides that the defendant in any State court action involving a claim of which Federal district courts have original jurisdiction may by filing the necessary papers remove the case to the local Federal district court. Thus, any school board sued in a State court could remove the case to a Federal court where the restriction of remedies sought by these bills would come into play. *Avco Corp. v. Aero Lodge*, 390 U.S. 557 (1968). As the Supreme Court noted in a case involving the anti-injunction provisions of Norris-LaGuardia, there is "obviously a compelling incentive" for defendants to remove to federal court, when they thereby "gain the advantage of [Federal] strictures upon injunctive relief." *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 245 (1970).

The effect of the general removal statute, therefore, is to cut off the possibility of obtaining a constitutionally adequate remedy in a nonfederal form. *This leaves no judicial forum capable of according full protection to the constitutional rights of black school children.* There is nothing to support such a result in the decisions allowing Congress to allocate judicial business between state and federal courts.

It is irony indeed that the removal statutes, enacted in the post-Civil War period and designed to ensure "the primacy of the federal judiciary in deciding questions of federal law", *Avco, supra*, 390 U.S. at 560, should serve to ensure that constitutional rights can receive no greater protection in state court than the proposed legislation would allow in a federal forum.

5. S. 179, S. 619 and S. 1737 Are Not Constitutionally Supportable as an Exercise of Congressional Power to Define the Jurisdiction of Federal Courts

The clear purpose and predictable effect of the legislation is to prevent full and effective vindication of Fourteenth Amendment rights, by barring federal courts from exercising ordinary equity powers to aid the desegregation process. Plainly the legislation is not simply an attempt to allocate the judicial business of the United States among available courts or to provide housekeeping rules for the orderly handling of that business. It does not remove a neutrally defined subject matter from the reach of federal courts, but aims specifically at hampering the enforcement of constitutional rights—it preserves jurisdiction in order to deny enforcement. Nothing in the available caselaw suggests that such an abuse of legislative power is permissible.

Much remains to be said in order to sketch the extent of the invasion of judicial integrity that is proposed.

Last term, in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the Supreme Court held that an action for money damages would lie in federal court against federal officials alleged to have violated the Fourth Amendment, although Congress had never created a statutory right to sue for such relief. The Court itself created the cause of action, finding that available remedies for such constitutional deprivations were not fully effective. The Court cited and relied upon the following language of *Bell v. Hood*, 327 U.S. 678, 684 (1946):

> ". . . it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the state to do. Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that the courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

In his careful and scholarly concurrence in *Bivens*, Justice Harlan acknowledged that "the judiciary has a particular responsibility to assure the vindication of constitutional interests," 403 U.S. at 407, and emphasized "the presumed availability of federal equitable relief against threatened invasions of constitutional interests . . ." 403 U.S. at 404.

"The reach of a federal district court's 'inherent equitable powers,' *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 460. (Burton, J., concurring), is broad indeed, *e.g.*, *Swann* v. *Charlotte-Mecklenburg*. . . . [A] general grant of jurisdiction to the federal courts by Congress is thought adequate to empower a federal court to grant equitable relief for all areas of subject-matter jurisdiction enumerated therein, see 28 U.S.C. § 1331(a)." 403 U.S. at 405.

The proposed legislation flies in the face of each of the premises of the *Bivens* decision. It is an attempt to render the courts unable to discharge their "responsibility to assure the vindication of constitutional interests"; specifically, the legislation seeks to deny the power of courts "to adjust their remedies so as to grant the necessary relief," thus invading the "inherent equitable powers" of the judicial branch, as exercised in *Swann*. In the *Bivens* situation itself Congress had not previously sought to foreclose the remedy that the Court held to be necessary, but the Government specifically argued in the *Bivens* case that *once* a constitutional remedy is in fact created by the Court, Congress would probably have no power to withdraw the remedy by legislation: "At the least there would be substantial doubt whether Congress could simply reject a judicially-created remedy bottomed on the Constitution; a constitutional amendment might be needed for such an end." Brief for the United States in *Bivens*, at 21–22.

Grave constitutional doubts about congressional repeal of *Bivens* translate themselves into a certainty that congressional overruling of *Swann* is prohibited by the Constitution. For under the proposed legislation, federal courts would still be required to adjudicate school desegregation cases, but would be barred from according the full relief required by the Fourteenth Amendment. It is obviously offensive to the principle of separation of powers for the courts to be required to adjudicate a controversy and yet be rendered unable to decide it in accordance with the Constitution—in light of American judicial history since *Brown II*, it is a particularly egregious assault upon judicial integrity for Congress to require that federal courts pronounce upon school desegregation cases yet be without power to grant an effective remedy to redress the wrong uncovered and denounced. To retain jurisdiction and bar enforcement places the courts in an intolerable position: "Jurisdiction is always jurisdiction only to decide constitutionally." Hart & Wechsler, *The Federal Courts and the Federal System* at 340 (1953). See *United States* v. *Klein*, 13 Wall. 128 (1871).

Finally, the proposed legislation is more than a mockery of the constitutional rights left without enforcement, and more than "an unconstitutional attempt to invade the judicial province." *Glidden* v. *Zdanok*, 370 U.S. 530, 568 (1962) (Harlan, J.). The proposed legislation would have the intended effect of freezing an unconstitutional state of affairs by interfering with the corrective judicial process commenced after *Brown II*. A federal court would be compelled to uphold a desegregation plan well short of what the Constitution requires. The legislation would involve the federal judiciary in sanctioning unconstitutional conduct and ratifying the continuance of a constitutional wrong unabated. Should the courts actually refuse to grant the relief required by *Swann*, and instead approve desegregation plans that do not and cannot satisfy the Fourteenth Amendment, then they would become at least as involved in the underlying discriminatory conduct as courts that lend enforcement aid to racially restrictive covenants.

Such a course is barred by *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), for courts are surely among the addressees of the Constitution, and are bound by the judicial oath to enforce the Constitution as the supreme law.

Indeed, the role of the judiciary under the proposed legislation would be vastly worse than that condemned as unconstitutional in *Shelley*. In the situation under discussion, the underlying discriminatory conduct is official, not private—and, of course, the courts cannot simply withdraw from an enforcement role, as in *Shelley*. The courts would remain open to exercise all traditional judicial powers in order to enforce all other constitutional rights calling for equitable relief—all, that is, other than the class of rights uniquely within the purview of the Fourteenth Amendment and uniquely within the protection of the federal courts. The proposed legislation would, in short, single out the rights of a minority and place a special roadblock in the path of their ultimate vindication; it would amount to authorization and approval of the failure of school officials to discharge their affirmative constitutional duty to desegregate; and it would render the courts—and the Congress—complicit in the denial of constitutional rights. When abandonment of a corrective process designed to redress racial discrimination has involved consequences such as these, the Supreme Court has not hesitated to condemn the action as violative of the Constitution. See *Hunter* v. *Erickson*, 393 U.S. 385 (1969); *Reitman* v. *Mulkey*, 387 U.S. 369 (1967).

J. A WITHDRAWAL OF JURISDICTION OVER ALL CASES INVOLVING THE PUBLIC SCHOOLS WOULD BE UNCONSTITUTIONAL

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U.S. SENATE,
Washington, D.C., February 27, 1974.

Hon. SAM J. ERVIN,
Chairman, Subcommittee on Constitutional Rights, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: I am enclosing written testimony prepared by Roy N. Wells, Jr., Chairman of Citizens for Community Schools of Prince Georges County, Inc. This material addresses itself at the subcommittee's recent hearings on busing.

I would appreciate it if this testimony and the supporting material could be included in the hearing record.

Thanking you for your cooperation and with best wishes, I am

Sincerely yours,

J. GLENN BEALL, Jr.

Enclosure.

WRITTEN TESTIMONY PREPARED BY ROY N. WELLS, JR., CHAIRMAN, CITIZENS FOR COMMUNITY SCHOOLS OF PRINCE GEORGES

Mr. Chairman and members of the committee, Citizens for Community Schools of Prince Georges County, Maryland, Inc. would like to offer testimony on behalf of the citizens of Prince George's County who boast the tenth largest school district in the U.S., and the county which has faced the largest court-ordered busing to achieve racial balance in the Country to date. We offer testimony in favor of S. 179, S. 287, S. 619 and S. 1737.

The American people have consistently expressed their opposition, 85% or more, to busing in numerous public opinion polls. We feel a Constitutional amendment is the only means to translate this opposition. The American people are very concerned about busing and are outraged by the lack of responsiveness of our political system to their overwhelming opposition to something people do not want.

We realize that there were instances before the Civil Rights Act of 1964 where a black child was bused past his neighborhood school to attend a black school or a white past his neighborhood school to attend a white. That was wrong! And it is just as wrong today to bus a black or a white child past his neighborhood school in order that he will become a part of a racial balance in a school.

The Civil Rights Act of 1964, Public Law 88–352, states:

Section 401–B: "'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

Section 407–2: ". . . and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance . . ."

In May of 1972, the Maryland State Court of Appeals found Prince Georges County to be in full compliance with HEW standards, i.e., segregation in this school system was de facto and not de jure; yet in 1973, the Federal Court found this county to be de jure segregated. We find it very difficult to accept the Supreme Court's interpretation of the Civil Rights Act.

This was a summary judgment based on the influx of black families into Prince Georges County after the riots of 1968 in Washington, D.C. In Prince Georges County we have open housing laws, well-integrated neighborhoods, and neighborhoods where people choose to set up their own communities with their own people, be they black, white, Italian, Chinese, or any other ethnic group.

Prince George's County is one of the fastest growing counties in the nation; however, its public school attendance continues to decline. Private and church schools are gaining our students. Prince George's County's student enrollment prior to busing was 160,238 in January 1973; the number dropped to 153,334 in January 1974, a loss of 6,904 students in one year of busing. One of the fastest growing counties in the nation with public school enrollment declining—the message is loud and clear.

Much has been said about the hardship that racial busing inflicts on the citizens of this great Country. In Prince George's County, the purchase of 40 new buses, at a cost of $303,673, in addition to the utilization of 25 buses from a spare fleet, have been added to the roads. The number of students riding buses now is 89,982 in comparison to 78,364 prior to desegregation, or 11,618 additional students being bused for the first time.

Gasoline consumption for the additional buses certainly doesn't help the energy crisis of today. The gasoline consumed from January 1973 to June 1973 was 1,100,000 gallons as compared to 785,000 gallons used from July 1972 to January 1973—an increase of 40% in a period of six months. The average distance traveled by students is 6.9 miles, although many children are riding a distance of ten miles or better, as compared to the walking distance of one mile or less prior to desegregation. This results in the consumption of 2,578,000 gallons of precious gasoline per school year.

Since busing came to Prince Georges County classes begin as early as 7:30 a.m., and conclude as late as 4:30 p.m. Daylight savings time has caused several changes, such as reduction of class hours of instruction by thirty minutes per day.

More important, our county has witnessed several tragic accidents related to bused students. A full report on bus safety is attached for your review.

Our great Country has proven endurance through many hardships of a worthy cause; however, this is one hardship of unfounded basis and cannot be endured by the parents and children of a free society.

We would like to quote James Kilpatrick, syndicated columnist:

"I do not believe America indefinitely will tolerate racial-balance busing, for if ever a device were contrived that is essentially unAmerican, this is it. One of these days black and white parents will rise up together to demand an end to this insane reordering of their lives, and we will have what the Supreme Court, in its more lucid moments, has said a free and equal people ought to have—not 'white' schools or 'black' schools, or neatly compounded, racially proportioned schools, but 'just schools.' Such a prospect may suggest a bad day for liberals, but it would be a great day for freedom."

The Federal Courts have been unable to police their own actions with respect to when they are leaving the field of desegregation and crossing into the field of racial balancing. The Civil Rights Act of 1964 has been broken and gentlemen, nothing short of a Constitutional amendment will rectify this injustice.

The courts have, by some tortured logic, decreed for our children what they themselves would not suffer.

Respectfully submitted,

ROY N. WELLS, Jr., *Chairman.*

MOTOR VEHICLE DEATH RATES

There is a constancy of motor vehicle death rates over long spans of time. Figure 1 is taken from information on page 59 in reference 1. Figure 1 reflects the United States death rates per population and death rates per vehicle mile over the past 23 years. Over 23 years the death rate per population varied only within 20.8 and 27.7 deaths for every 100,000 of the U.S. population. The death rate per vehicle mile varied between 7.6 and 4.5 deaths per every 100 million vehicle miles over the same 23 years with a trend indicating decrease in the rate with the years. A reasonable person might ask how can a rate per population increase but a rate for travel distance decrease. The answer is the average vehicle traveled more in 1970 than in 1950, and the rate per vehicle mile trend is correct. The key point to observe is that deaths are related to vehicle miles. If, for example, gasoline rationing becomes a reality, the death rate per population would decrease, while the rate per vehicle mile would remain unchanged (less vehicle miles—less deaths).

Table 1 gives a clearer picture of the rates of figure 1. With a national population of 208,000,000 in 1972, there was a motor vehicle on the average for each 1.71 persons (see column labeled POPULATION PER VEHICLE), and each vehicle on the average traveled 10,300 miles. These statistics indicate the inflation and relative affluence of the present time. In 1950 relatively poorer times showed a population of 3.07 persons per motor vehicle, and an average of 9,310 miles traveled per vehicle.

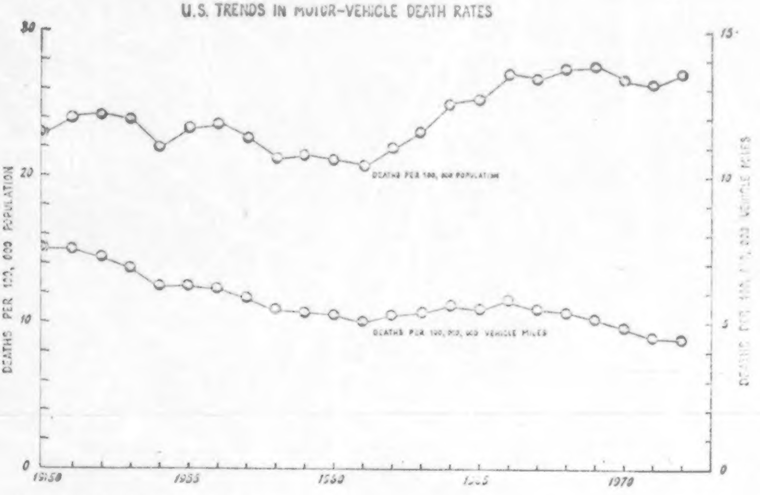

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FIGURE 1

TABLE 1.—ADDITIONAL DATA CONCERNING FIG. 1

Year	Deaths	Millions of registered vehicles	Millions of population	Population per vehicle	Thousands of miles per vehicle per year [1]	Deaths per 100,000,000 passenger miles [2]
1950	34,763	49.2	151	3.07	9.31	2.47
1951	36,996	51.9	154	2.97	9.46	2.54
1952	37,994	53.3	156	2.93	9.64	2.54
1953	37,995	56.3	158	2.81	9.66	2.48
1954	35,586	58.6	161	2.75	9.59	2.30
1955	38,426	62.8	164	2.61	9.65	2.43
1956	39,628	65.2	167	2.56	9.68	2.45
1957	38,702	67.6	170	2.51	9.57	2.38
1958	36,981	68.8	174	2.53	9.67	2.20
1959	37,910	72.1	176	2.44	9.71	2.22
1960	38,137	74.5	180	2.42	9.65	2.19
1961	38,091	76.4	183	2.40	9.66	2.15
1962	40,804	79.7	185	2.32	9.62	2.29
1963	43,564	83.5	189	2.26	9.64	2.39
1964	47,700	87.3	191	2.19	9.70	2.57
1965	49,163	91.8	194	2.11	9.67	2.63
1966	53,041	95.9	196	2.04	9.70	2.79
1967	52,924	98.9	197	1.99	9.73	2.76
1968	54,862	103.1	199	1.93	9.85	2.80
1969	55,791	107.4	201	1.87	9.97	2.79
1970	54,800	111.2	205	1.84	10.07	2.66
1971	54,700	116.3	206	1.77	10.20	2.60
1972	56,600	121.4	208	1.71	10.30	2.65

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[1] Equivalent to thousands of miles per passenger per year.

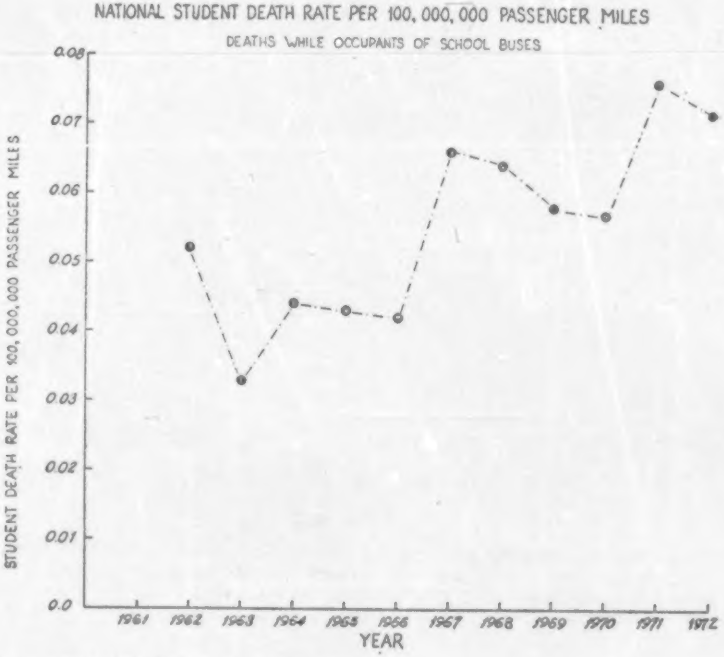
[2] Based upon average population per vehicle to convert vehicle miles to passenger miles.

Trends caused by inflation and recession can be seen by examining the population death rate, the upper line in figure 1. In the 1950's lack of buying power mandated less vehicles and less driving, and a lower population death rate. In the 1960's an overabundance of money encouraged more vehicles and vehicle travel, and a higher population death rate than in the 1950's. For a corollary illustration of the relationship between motor vehicle deaths and U.S. industrial products (national prosperity), see figure 5, page A11, Volume 2 in reference 2.

The rightmost column in Table 1 completes the explanation of the death rates of figure 1 and their trends. If one takes the vehicles miles of a specific year, and multiplies that value by the average number of persons per vehicle during that year, the answer should reflect the passenger miles for that year. For example in 1950, the average population per vehicle was 3.07, and for each vehicle mile, 3.07 passenger miles were accumulated. This difference between vehicle miles and passenger miles must be understood because it will be used again in the explanation of school bus statistics. From this method of relating vehicles and passenger miles, the rightmost column in Table 1 labelled DEATHS PER 100,000,000 PASSENGER MILES resulted. Now note that the trends for passenger mile death rate follow the population death rate. That the National Safety Council chooses to use a vehicle mile death rate with its decrease with time is a natural wish of persons responsible for motor vehicle safety that some death rates show a decrease with time.

It must be stressed that over the 23 years shown in figure 1, when conscientious and forceful effort was made to improve vehicles, passenger restraint systems, highways, and highway accident survival, at best this nation reduced the death rate per vehicle mile from 7.6 to 4.5. In 1972 56,600 persons died in motor vehicle accidents.

SCHOOL BUS DEATH RATES

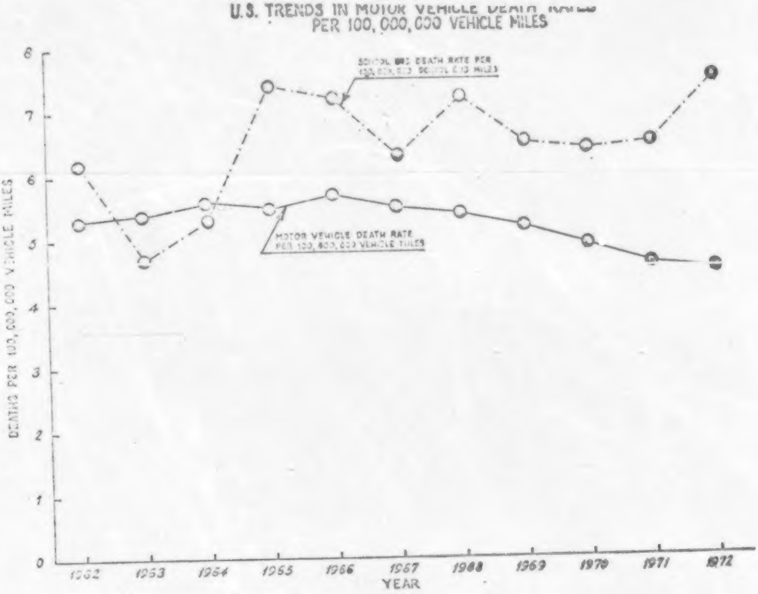


Source: Accident Facts, National Safety Council Council, Chicago, Illinois.

FIGURE 2

Figure 2 shows the student death rate per 100,000,000 school bus passenger miles. As explained in the preceding section, bus passenger miles are different from bus vehicle miles. Bus passenger miles are related to bus vehicles miles by a factor of 20, the average occupancy of school buses. This low average occupancy is caused by buses running empty of students half the time because of the return trip. Figure 2 also is misleading in that it only includes deaths of only the students riding on school buses.

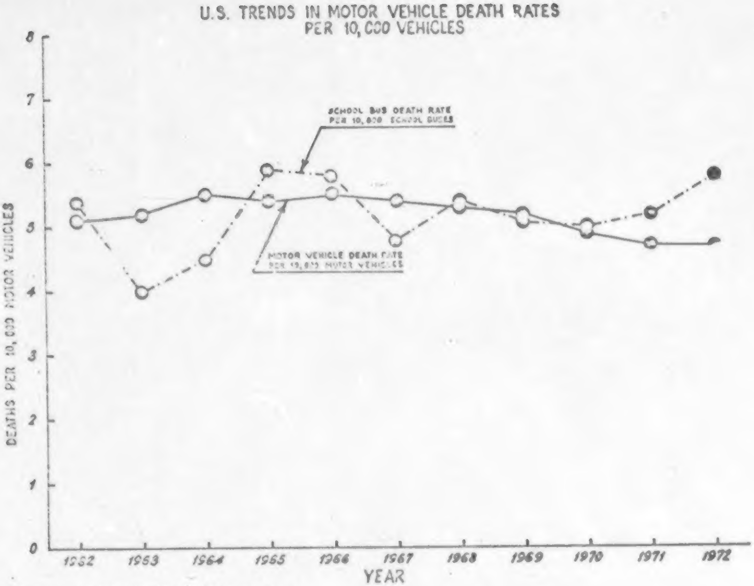
In figure 1, the total deaths used in the calculation of rate included not just the occupants of the death vehicles, but pedestrian deaths as well. In figure 2 only the students deaths on the bus were used to calculate the rate. To make a valid comparison between general vehicle death rates and school bus death rates, figure 3 has been drawn to include all deaths involving school buses. This includes dead school bus drivers, dead student pedestrians, dead non-student pedestrians, and dead persons in the vehicles struck by or striking school buses. Figure 3 also includes the vehicle mile death rate from figure 1 for the nation over the years data was available for school buses. What does figure 3 mean? It means that a school bus on our national highways stands just as poor or good a chance as the average motor vehicle. Figure 2 says because more persons are moved on a school bus than on the average motor vehicle, the death rate per passenger mile for school buses looks good (safer). When looking at figure 3, the safety factor of school buses disappears.



Source: Accident Facts, National Safety Council, Chicago, Ill.

FIGURE 3

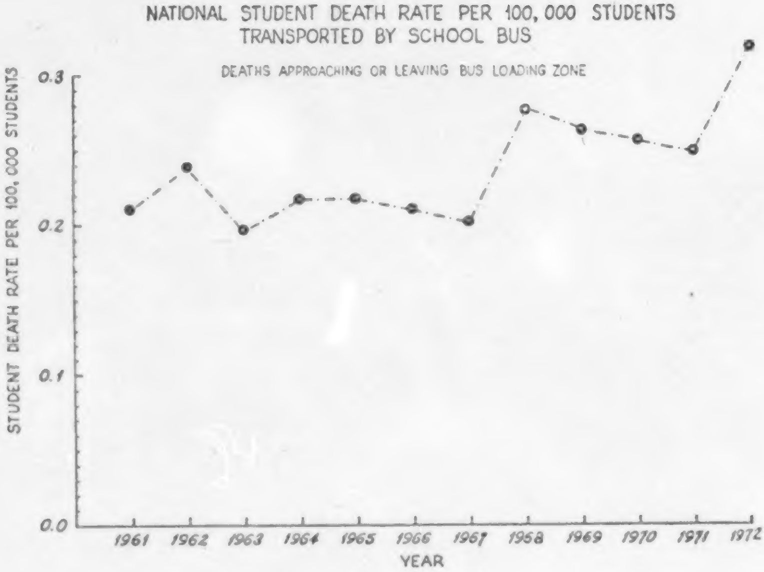
Now look at the death rates per number of vehicles on the road. Figure 4 is a comparison of the deaths per total number of motor vehicles in the nation and school bus related deaths per school buses in the nation. Figure 4 is more of the same of figure 3.



Source: Accident Facts, National Safety Council, Chicago, Ill.

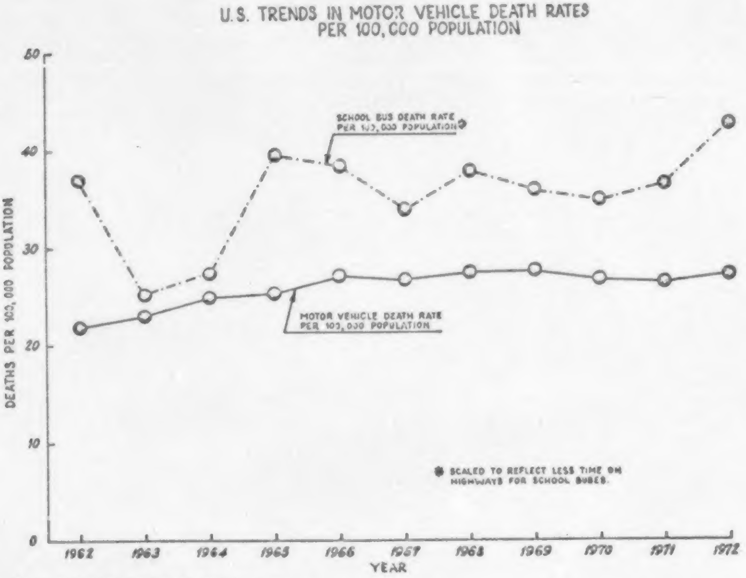
FIGURE 4

In figure 5, the student death rate for children run over by their own bus or run over while leaving and entering the school bus loading zone is shown. This rate also shows an increasing trend, similar to the population death rate increase in figure 1, but again a drastic difference exists between the national rates per population of figure 1, and the rates for student pedestrian death in the bus loading zone. The explanation of the difference is straightforward—figure 1 includes all pedestrian and occupants of motor vehicle deaths over 24 hours each day for the entire year, while figure 5 only includes student pedestrian deaths in the school bus loading zones during small fractions of the day on 180 school days each year. If one assumes that the total deaths involving school buses (occupant and pedestrian, student and non-student) should be considered to occur only over a time span of one hour on just 180 days, a different graph results. Figure 6 shows the total deaths listed in reference 3, divided by the number of students transported daily, and multiplied by the ratio of (365×24) (180×1) or 48.7, the factor of the time differential for school buses and student exposure compared to national population exposure.



Source: Accident Facts, National Safety Council, Chicago, Illinois.

FIGURE 5



Source: Accident Facts, National Safety Council, Chicago, Ill.

FIGURE 6

Why aren't the death rates lower for school buses than for the general class of death rates shown in figure 1? Traditionally our nation has paid great attention to protecting our children. We paint buses bright yellow, put red, flashing lights on them, pass all types of laws (with severe penalties for infraction) requiring all other vehicles to stop far away from the bus when it stops, make school bus routes in residential areas in order to maintain low bus speeds, and avoid rush hour traffic situations. Yet we haven't been successful. Can the death rates for school buses ever be made to go to zero? In the period 1962 to 1972 we have gone in the opposite direction.

School Bus Injury Rates

The results of the preceding section were not some quirk, a play on numbers. Consider page 64 of reference 1, which lists separately the accident rate per vehicle mile for all types of motor vehicles during 1972. Of the 36 vehicle types listed, only 10 were worse than school buses. School buses had an accident rate of 17.54 per 1,000,000 vehicle miles. Over the period 1970 to 1972 the school bus average rate was 16.74, again reinforcing the increase of the school bus death rates of the preceding section with the passage of years.

In 1971 for the nation there were 2,000,000 injuries and 1,186 billion vehicle miles, or a rate of 169 injuries per 100,000,000 vehicles miles. In 1971 there were 5,600 persons injured from school buses (including 4,200 pupils) and 2.3 billion bus miles, or a rate of 200 injuries per 100,000,000 bus miles.

In 1972 for the nation there were 2,100,000 injuries and 1,250 billion vehicle miles, or a rate of 168 injuries per 100,000,000 vehicle miles. In 1972 there were 6,000 persons injured from school buses (including 4,500 pupils) and 2.4 billion bus miles, or a rate of 250 injuries per 100,000,000 bus miles. Again there is an increasing rate.

In 1971 for the nation there were 2,000,000 injuries and 116.3 million motor vehicles, or a rate of 172 injuries per 10,000 motor vehicles. In 1971 there were 5,600 persons injured from school buses (including 4,200 pupils) and there were 290,000 buses, or a rate of 193 injuries per 10,000 school buses.

In 1972 for the nation there were 2,100,000 injuries and 121.4 million motor vehicles, or a rate of 173 injuries per 10,000 motor vehicles. In 1972 there were 6,000 persons injured from school buses (including 4,500 pupils) and 310,000 bus vehicles, or a rate of 193 injuries per 10,000 school buses.

Walking to School Versus Riding a Bus to School

In reference 4, one can find the following statement:

"That children who ride buses are safer than children who walk was supported by a 6 year report compiled by the Pennsylvania Department of Education. The report found bus riding three times safer than walking—one accident for every 280 people who walked to school, against one for every 898 who rode to school on a bus."

That statement is easily found in that reference, but the Commission on Civil Rights and the Pennsylvania Department of Education have yet to find a copy of that report which describes those statistics. How far did those children walk to school? How far did the buses drive to school?

In the Washington Star newspaper of March 11, 1973, appears the statement: "The latest figures of the National Safety Council report an accident rate of .09 for boys and .07 for girls who walk to school, but only a .03 rate for children riding buses."

In that reference to the National Safety Council, it was possible to trace those values to pages 90 and 91 of reference 5. In reference 5 on page 91 a caveat is given: "Since reporting is voluntary, the experience may not be representative of the national accident picture."

The rate of .03 is equivalent to 486 injuries for girls and 486 injuries for boys caused by riding on the bus during the 1968–69 school year, the school year the data were taken. This would total 962 injuries caused by riding on school buses in the 1968–69 school year, a ridiculously low figure compared to the 3900 actually reported as injured on page 93 of the 1970 edition of Accident Facts for pupil injuries caused in school bus accidents during 1968–69.

On pages 90 and 91 of the 1973 edition of Accident Facts, reference 1, there is reported an accident rate of .08 for boys (compare to .09 above) and .05 for girls (compare to .07 above) who walk to school, but only a .04 (compare to .03

above) rate for boys riding school buses and only a .03 (compare to .03 above) rate for girls riding school buses. The same caveat appears in the heading: ". . . may not be representative . . ."

This rate of .04 is equivalent to 1476 injuries for boys and the rate of .03 is equivalent to 1107 injuries for girls caused by bus riding during the 1971–72 school year, the year the data were taken. This would total to 2583 injuries caused by school buses during the 1971–72 school year, but compare this against 4000 pupil injuries on page 93 of reference 1 for the pupil injuries caused in school bus accidents during the 1971–72 school year.

However, deriding these questionable statistics does not answer the questions of how far did the children walk and how far were the children bused. The previous paragraphs only show that the claim made by some about the relative safety of riding to walking is a very suspect claim.

To settle the question of "safer on the bus than walking", look at the pedestrian death record in 1971 for the nation, page 61 of reference 5. In the age bracket of 5 to 14 years, there were 2000 pedestrian deaths and 500 bicycle deaths or a death total of 2500 for deaths while not riding motor vehicles. By computing an available time of 1.9% when children are suspectible to accidental death from motor vehicles while walking to school (assume 24 minutes for 180 school days over an entire year), there would be 48 deaths for school children walking or riding bicycles to school. In 1971 there were 50 student pedestrians killed in the school bus loading zones.

In 1972 there would be by similar reasoning 48 deaths for school children walking or riding bicycles to school. In 1972 there were 65 student pedestrians killed in the school bus loading zones.

Is this so strange? A nearby school within walking distance would have all intersections manned by school children patrols. Adult volunteers would control traffic at major intersections. Low speed limits would prevail in the immediate school area. Older children in families would be given the responsibility for the younger children. That walking to school under those circumstances would be safer than boarding and traveling 5 miles on a school bus is not so unreasonable. The information below will bear this out.

PRINCE GEORGES COUNTY SCHOOL BUSING MODIFICATIONS

Figure 7 gives the modifications to the Prince Georges County school transportation system on January 29, 1973. In the row dealing with the kindergarten and elementary school population, there were 91,367 students (pedestrian and bused) prior to January 29, 1973. Out of that 91,367 there were 10,248 who formerly walked 2,666,236 miles to school each year. After January 29, 1973 those 10,248 were bused 18,549,036 miles to school. Justify the safety of that change.

There were 20,735 elementary children who were bused to nearby schools prior to January 29, 1973. After the change these 20,735 were bused 10,545,084 additional passenger miles each year. In this group alone, there is no possible way to explain how their life has been made safer. These 20,735 children walk to the same bus stop, board the same bus, and stay on the highway longer.

The similar Junior and Senior school changes are listed in their respective rows of Figure 7. The results of these changes were not long in coming.

	TOTAL POPULATION 12-27-72	NUMBER OF FORMER PEDESTRIANS NOW IN BUSING PLAN	PASSENGER MILES * PER YEAR IF FORMER PEDESTRIANS BUSED TO NEAREST SCHOOL	ENFORCED PASSENGER MILES PER YEAR FOR FORMER PEDESTRIANS	NUMBER OF FORMER RIDERS BUSED FURTHER BY BUSING PLAN	RIDERS ADDITIONAL PASSENGER MILES PER YEAR
ELEMENTARY	91,367	10,248	2,666,236	18,549,036	20,735	10,545,084
JUNIOR	38,557	1,792	665,624	5,493,547	8,051	9,506,609
SENIOR	30,825	250	93,000	757,020	4,037	5,074,452

* These values reflect prior walking distance to nearest school in pupil miles.

FIGURE 7

PRINCE GEORGES COUNTY SCHOOL BUS ACCIDENT RECORD

Figure 8 shows that the Prince Georges County record is no better than the National school bus accident picture. Figure 8 compares the national bus accident rate per bus vehicle miles against the Prince Georges County rate over the years preceding the January 1973 change. In the Prince Georges County school system the number of accidents are carefully tabulated, the annual bus mileage for 1971–72 is suspect. Data for figure 8 were taken from reference 6, "Prince Georges County Summary of School Bus Accidents", July 19, 1972. Table 2 gives an explanation of the data used in Figure 8, and shows the reason for the 1971–72 decrease in the Prince Georges County rate.

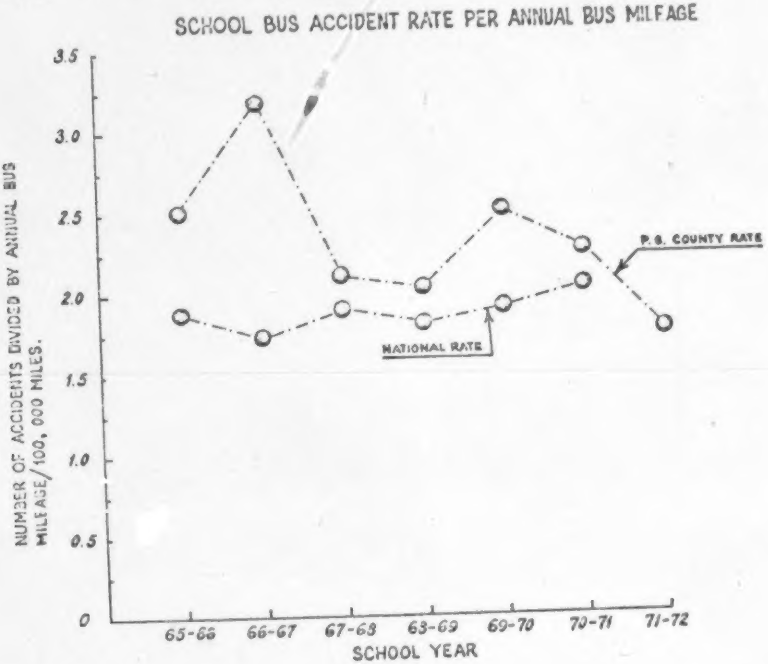


FIGURE 8

In 1970–71 there were 653 buses and 78,155 bused students. In 1971–72 there were 736 buses and 81,150 students. In 1970–71 and also in 1971–72 each bus claimed a daily mileage of 72.8 miles per day, yet no drastic changes in bus routes were made in 1971–72. The excess buses could not have accumulated the same mileage as in 1970–71. Obviously the bus mileage is over-reported for 1971–72 and the accident rate of 1.76 in that year on figure 8 is too low.

Now look at figure 9 for the total bus accidents during February through May of the past years and compare them against February through May of 1973 after the busing change. Data are presented in this format because the total number of accidents is the most accurately recorded in the county. The rate in figure 9 is plotted against the number of pupils transported daily, another accurately reported figure. If the number of accidents is not related to bus mileage, the rates for February through May of 1973 ought to be equivalent to the previous rates. The average of the rates for 66–67, 67–68, 68–69, 69–70, 70–71, and 71–72 was 88.9. For 1972–73 the rate was 94.8.

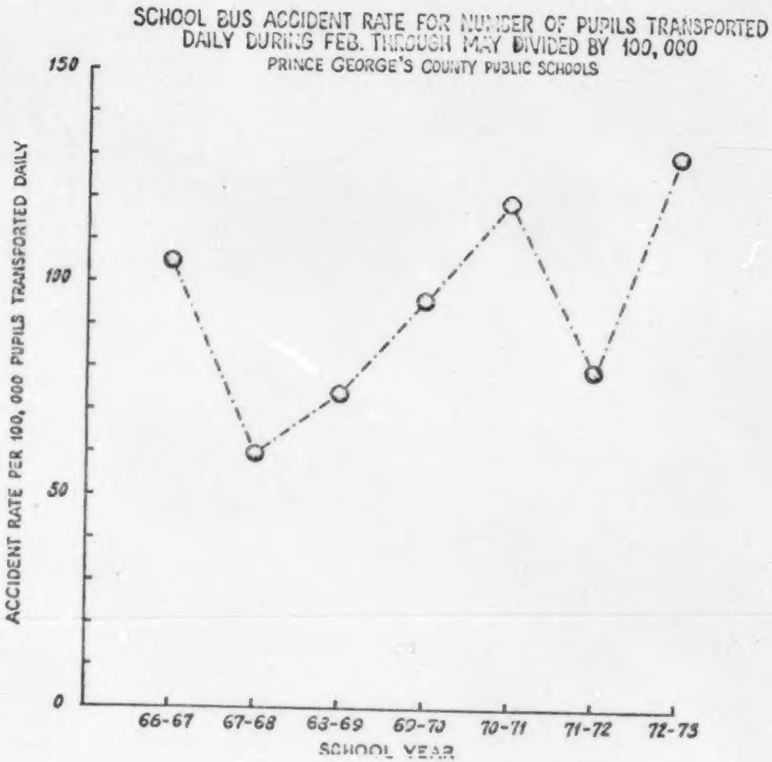


FIGURE 9

Table 3 lists the results of the busing plan in a more painful form. From Prince Georges County Summary of Accident reports, a tabulation was made of accidents and injuries in February through May 1972, and February through May 1973. Note that the ratios of total accidents and accidents with children on the bus are almost equal. The ratio of passenger miles, before and after is less than the ratio of accidents before and after, but it is suspected that the "after" passenger miles used for the calculation were under-reported in the December 1972 Prince George's County Desegregation Plan.

TABLE 2.—PRINCE GEORGES COUNTY PUBLIC SCHOOLS—SCHOOL BUS STATISTICS

Year	Number of accidents	Number of buses	Number of students bused	Claimed bus miles to school	Claimed miles to school/bus/year	Claimed miles to school/bus/day	Claimed bus miles on field trips	Field trip miles as percent of total claimed miles	Accident rate per 100,000 bus miles (claimed)
1965-66	106	409	----------	4,090,000	10,000	53.8	125,000	3.0	2.51
1966-67	142	431	51,650	4,310,000	10,000	53.8	137,500	3.1	3.19
1967-68	119	489	60,500	5,379,000	11,000	59.1	150,000	2.7	2.11
1968-69	139	547	67,600	6,564,000	12,000	64.5	232,800	3.4	2.04
1969-70	187	589	74,700	7,092,000	12,041	64.7	300,000	4.1	2.50
1970-71	207	653	78,155	8,838,375	13,535	72.8	300,000	3.3	2.26
1971-72	186	736	81,150	9,961,760	13,535	72.8	588,000	5.6	1.76

TABLE 3.—COMPARISON OF BEFORE AND AFTER JAN. 29, 1973

Category	February to May 1972	February to May 1973
Total bus accidents	65	118
Accidents with pupils on bus	16	31
Number of pupils injured	11	41
Passenger-miles	[1] 113,495,749	[2] [3] 163,421,497

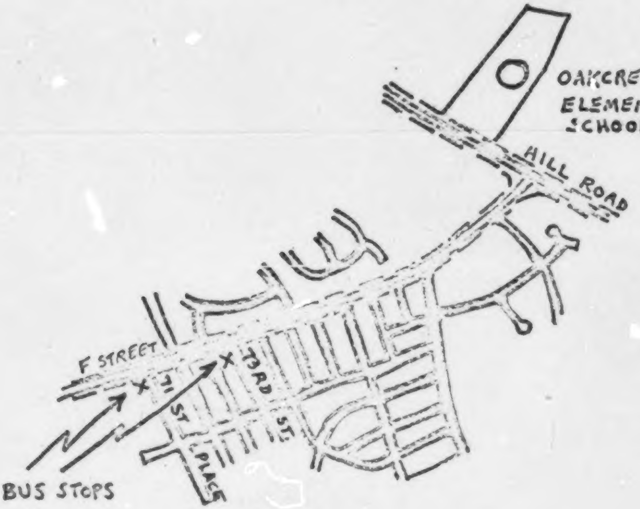
Ratio of total accidents (118/65)	1.82
Ratio of accidents with pupils on bus (31/16)	1.94
Ratio of pupil injury (41/11)	3.73
Ratio of passenger-miles (163,421,497 [2] /113,495,749)	1.44

[1] December 1972.

[2] From other indications, this is underreported.

[3] February 1973.

Two examples are shown in Figures 10 and 11 in order to relate the Figure 7 information to specific accidents. Figures 10 and 11 show the most notorious. In Figure 10 a sketch of a map illustrates why it is more dangerous to bus children longer distances to school. This accident pertains to busing children farther than before January 29, 1973. Fourteen children who were picked up by school bus at 71st Place and F Street, and 73rd Street and F Street, were bused



BUS STOPS
4000 FT
FROM SCHOOL
LINE-OF-SIGHT (LOS)

ACCIDENT
11,500FT FROM
BUS STOP (LOS)
LANDOVER ROAD
AT BELTWAY

ACCIDENT
6MILES FROM
BERWYN HEIGHTS ELEMENTARY
SCHOOL (LOS)

FIGURE 10

BEST COPY AVAILABLE

past Oakcrest Elementary School (their former school), a line-of-sight distance of 4000 feet from their home, toward Berwyn Heights Elementary School. The bus accident occured at Landover Road at the Beltway, a line-of-sight distance of 14,500 feet from the 14 injured children's bus stop. The accident occurred while the 14 children were 6 miles from their destination.

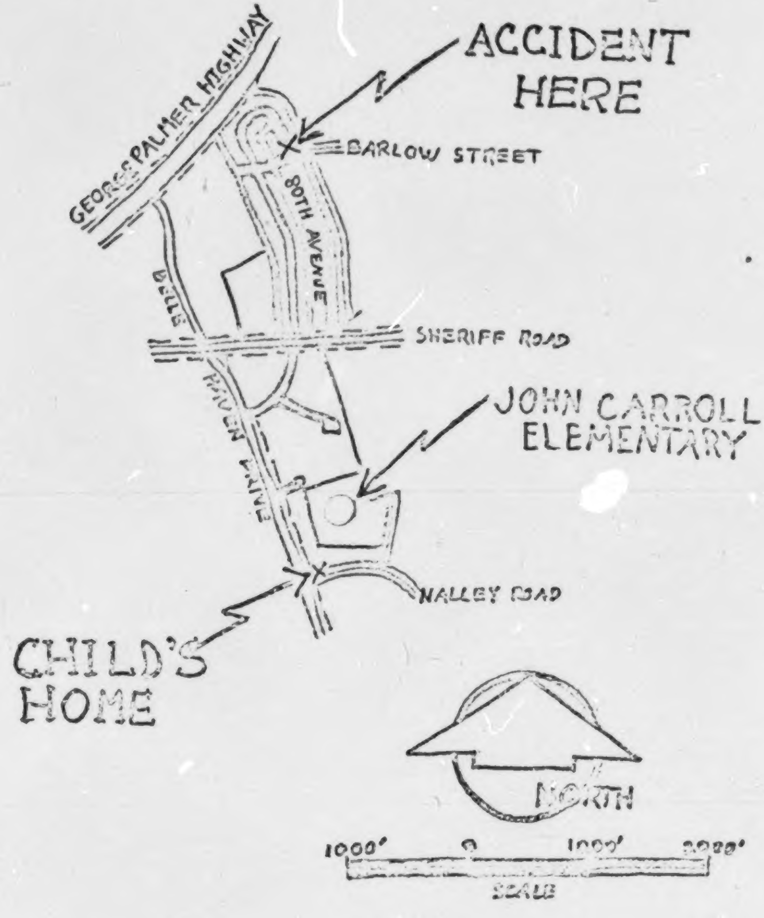

GEORGE PALMER HIGHWAY
ACCIDENT HERE
BARLOW STREET
80TH AVENUE
BELLE HAVEN DRIVE
SHERIFF ROAD
JOHN CARROLL ELEMENTARY
NALLEY ROAD
CHILD'S HOME
NORTH
1000'
0
1000'
2000'
SCALE

FIGURE 11

In Figure 11 a scale of feet is shown in this map sketch. A four year old child, whose home was on Nalley Road, walked over ½ mile to her bus stop. She walked past the school she normally would have attended, took a school bus to Lamont Elementary School in New Carrollton, and returned around noon time to her appointed bus stop. At that time of day it would be expected that no older children were on the bus since only the child's kindergarten class would be dismissed at noon. She was struck and killed by the school bus at 12:40 P.M. Is it safer to walk to school or ride a bus?

On October 3, 1973, a 12 year old boy was seriously injured by a motor vehicle while returning from Mary Bethune Junior High School, 7 miles line-of-sight distance from his home. He was probably cutting classes and hitch-hiking home, and his subsequent death will never be recorded as school bus accident related. Yet his school would have normally been one mile line-of-sight distance from his home.

What can be said further? These examples are not one time happenings. They will continue. The previous figures show the rates and their constancy, and it is only necessary to apply them to any specific situation. The numbers are not measures of Gross National Product or bushels of corn or test achievement scores—they represent children victims of the Prince George's County Children's Crusade.

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1. "*Accident Facts, 1973 Edition,*" Published by the National Safety Council, 425 N. Michigan Avenue, Chicago, Illinois, 60611

2. "*Safety 71, a Report on Activities Under the Highway Safety Act, January 1, 1971–December 31, 1971,*" U.S. Department of Transportation, National Highway Traffic Safety Administration

3. "*Pupil Transportation Safety Program Plan,*" U.S. Department of Transportation, National Highway Traffic Safety Administration, May 1973.

4. "*Your Child and Busing,*" The U.S. Commission on Civil Rights, May 1972

5. "*Accident Facts, 1972 Edition,*" Published by the National Safety Council, 425 N. Michigan Avenue, Chicago, Illinois, 60611

6. "*Summary of School Bus Accidents,*" Prince George's County Public Schools, July 19, 1972

ADDITIONAL LETTERS SUBMITTED FOR THE RECORD

U.S. CATHOLIC CONFERENCE,
Washington, D.C., February 13, 1974.

Hon. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights, Judiciary Committee, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: It is my understanding that as Chairman of the Senate Subcommittee on Constitutional Rights you have scheduled hearings to study legislative proposals to limit or eliminate so-called "forced school bussing". On behalf of the U.S. Catholic Conference, I would like to advise you of the position of the Conference on such "anti-bussing" measures.

During the past several years while the school bussing issue has been considered and debated in both Houses of the United States Congress, the U.S. Catholic Conference as spokesman for the American Roman Catholic Bishops has repeatedly communicated its views to the members of both the House and the Senate.

The Bishops of the United States have consistently taken the position that the issue of racial relations is fundamentally a moral question. The right of all children to an equal educational opportunity is one very important dimension of this issue.

In the historic 1954 Supreme Court decision of Brown v. The Board of Education, it was found that racially segregated education is inherently unequal. One does not need the U.S. Supreme Court or any sophisticated research to know that the many thousands of children who are trapped in the vicious cycle of poverty within the racially segregated ghettos of our American cities do not have the same educational opportunities of the children of middle and upper class families.

It has been shown time and again that the only answer for these children is an opportunity for quality integrated education. In a great many instances school bussing is an essential means for providing these children with this kind of an opportunity. To eliminate bussing as a means of achieving this great goal would, in my opinion, be disastrous. During the height of the debate in 1972, Father Theodore Hesburg, the former Chairman of the U.S. Commission on Civil Rights put it much more dramatically. He said that such an action in effect, "burns the last bridge out of the ghetto". I wholeheartedly concur with this assessment.

Furthermore, I do not believe that the recent "energy crisis" in any way justifies a reconsideration of the basic commitment of the United States Government to insure that every American child has a right to an equal educational opportunity. We have emphatically stated our position in recent communications to the Administration that the necessary steps must be taken to insure that the present crisis does not undermine the provision of essential community services in the areas of health, education and welfare. The poor and all of those minority groups that do not have a strong voice in the affairs of our national government must be protected at all costs from the adverse impact of this crisis.

Therefore on the occasion of the hearings, which you have scheduled, we would like to reiterate our strong opposition to any legislation which would prohibit or severely limit the use of school bussing as one means of insuring racial justice and equal educational opportunity for all American children.

I respectfully request that this letter be included in the record of your hearings.

Sincerely,

Most Rev. JAMES S. RAUSCH,
General Secretary.

WINSTON-SALEM/FORSYTH COUNTY SCHOOLS,
Winston-Salem, N.C., February 20, 1974.

Hon. SAM J. ERVIN, Jr.,
Senate Office Building,
Washington, D.C.

DEAR SENATOR ERVIN: I hear with great interest that you and your committee are reopening hearings into the problems of cross-busing. As a member of our local Board of Education I have had, and continue to have, great misgivings about the results of massive cross-busing of our children. It is my hope that you and your colleagues will not let this opportunity pass without legislation being approved that will take the schools from under the jurisdiction of our courts in regard to cross-busing.

I am enclosing an article which appeared in the Winston-Salem Sentinel about a week ago giving the thoughts of the youngsters that are actually involved, or have been involved, in cross-busing and their feelings of the problems it causes.

It is my hope this can be added to your hearing record of your committee.

Sincerely,

JOHN A. REDDING,
Board Member.

Enclosure.

[From the Twin City Sentinel (Winston-Salem, N.C.), Feb. 12, 1974]

275 STUDENTS IN 14 SCHOOLS POLLED—TEENS: BUSING, INTEGRATION CAUSE LOW METROPOLITAN TEST SCORES

(By Larry Queen)

Integration implemented by busing has lowered classroom standards here to the level of students behind in learning and has resulted in the decline in scoring of Forsyth students taking the Metropolitan Achievement Test for the past three years.

That is the summation of the prevailing opinion which emerges in a Teen Page poll of 275 boys and girls in 14 high and senior high schools here.

Some blame for the declining test scores was also attributed to inadequate teachers, school experiments in education, parental and student apathy, lack of widespread public kindergartens, and poor teaching methods, especially in math and reading. A number of teens said students often don't know how to multiply or divide by the time they reach the seventh grade.

MIXING STUDENTS

In the largest single category of opinions, 92 boys and girls scattered throughout the schools said busing, integration and mixing of students "behind" with students "ahead" in learning has resulted in lower classroom standards throughout the system. Lower metropolitan Achievement Test scores are the result, they said.

"The primary purpose of desegregation of our schools was to equalize the curriculum differences between black schools and white schools," said Ann Rakes of North Forsyth Senior High School. "The result, of course, was that the curriculum of the 'higher' schools dropped to equal the curriculum of the 'lower' schools. This drop is naturally evident in the test scores of the students."

FORCED INTEGRATION

"Having forced integration has lowered the standard of each classroom," said Natalie Simpson, 14, of Paisley High School. "The teachers have been compelled to spend an unproportionate amount of time working with the less capable students. That means the more capable students have not had the attention, work and stimulus to go ahead in various subjects."

Melanie Newsome of North Forsyth said, "Our newly incorporated 4-2-2-2 school plan, and cross-busing to achieve racial balance, combined with poor supplementary teaching equipment and low teacher wages, have hampered if not completely stifled our whole educational program."

"Because of the busing and mixtures of black and white students in schools, our averages have gone down," agreed a 17-year-old boy at Parkland Senior High School. "It has been my observation that black students don't generally want to learn as much as the white students because of their parents' attitudes and general background. Because blacks don't want to learn, whites are slowed down."

DISGUSTED, APATHETIC

Also a prevailing opinion in the poll was that, as a result of tailoring all classes to "slower" students, many teachers and advanced students have become disgusted and apathetic about public education.

Classroom motivation, morale and discipline have deteriorated widely, the students said, and many teachers are frustrated.

Many students said the school system has compromised on the quality of education to the extent that some blacks with inadequate training in formerly segregated schools "get by" now whether they do enough work or not. A white Atkins High School boy, 15, said that blacks "don't have to work to pass, so why should whites?"

TEACHERS GIVE UP

"Integrated teachers have given up," said a student at Forsyth Country Day School, professing knowledge of the situation in public schools.

"The teachers don't seem to have as much concern for their students as they used to," said Carole Smith of East Forsyth Senior High School.

Mike Hill, 15, of Atkins said, "Teachers don't give a damn, so why should the students?"

Transferring of teachers, as well as students, around in the school system has been detrimental, the students said.

"Both teachers and students have been thrown around so much that the teachers don't know what to teach to their students," said Elizabeth Colley of Hanes High School. "The result is an overlapping of subjects covered and a waste of time."

As to discipline . . .

Ruth Ann Watson, 16, of Hanes said, "Since lack of discipline in the schools is hindering the learning process, many teachers spend most of the day controlling the class. Then there is not enough left to teach."

Jami Oates, 15, of Hanes said, "Methods of teaching had to be changed when the schools integrated. The teachers seemed to have had to make learning easier for the pupils instead of leaving it up to the pupils to use their total learning capacity to work at full capacity."

"Winston-Salem—Forsyth County teachers are not as capable in many cases, especially those graduating from black universities, also with low standards," said Kimberly Marshall, 14, of Mount Tabor High School. "They are unable to control classes, many times don't care about their students and therefore students don't care about school."

"The integration caused hard feelings to come among the black and whites," said Kathy McBride of West Forsyth. "Small children get settled at one school, then they get transferred to another. Teachers have given up their high standards . . . the classes are now mixed with above average students and failing ones."

Renee Salley of North Forsyth said she thinks the decline in the Metropolitan Achievement Test scores here is due "to lack of stress on education by the federal government. The government seems more interested in racial balance, and pleasing a few people, rather than quality of teachers and materials for education."

"Integration," said Jimmy Affeldt, 14, of Paisley High School, "has brought students together from all types of environments. Students from poorer environments have had fewer opportunities for learning."

Suzanne Berrier, 16, of Anderson High School couples this with overcrowded conditions in classrooms. "The slower students cannot have as much individual help, and the more intelligent students have to be slowed down and eventually become bored."

The students polled placed a large share of blame for declining test scores also on teen-agers themselves. Some students stop applying themselves because of boredom, they said, or because parents and teachers have not pressed them, motivated them to seek success in education. A "don't care" attitude is widespread among students, scores of teens polled said.

"Kids aren't as interested in school as they used to be," said Robin Enscore, 15, of Anderson High School.

DON'T TRY AS HARD

"Students don't try as hard as they used to," said Stephen Gregory, 15, of Kennedy High School. "Because they don't care," added his classmate, Brian Wham. "Students are not interested in the work, only in making a passing score," said Percell Davidson, another Kennedy student.

The apathy often results from poor caliber of teachers or teachers frustrated by difficult classroom conditions, the teens said. Sometimes it is due to parents who are too permissive or disgusted about the busing situation, the teens said.

"Teachers just don't apply themselves to their jobs," said Kathi Estes of Kennedy High School. "If a student fails a test, the teacher just forgets it and goes on to something else."

"I believe desegregation has a lot to do with today's lack of interest and learning," said Tommy Larrimore of Hill High School.

"Too many parents don't take time to look at how their children are doing in class," said Robin Parnell, 15, of Hill.

There is, in any case, a growing attitude among the young of caring little for an education or for material things a good education is supposed to lead to, the teens said.

"Today there is less pressure to get ahead," said Sue Howell of Paisley. "Though they are still important, less importance is placed on material things or prestige. Therefore, it is not as important to do well in school so you can get a high-paying job. Also, schools are not as threatening anymore. Children do not view teachers as all-knowing, all-powerful tyrants. They know that life will not end if they do not get an 'A' on a test. Also, parents are taking a less strict attitude about grades."

There is, said Deane Dugger, 15, of Mount Tabor High School, a growing "disinterest of the students in the older generation's system of education . . ."

Carol Holt of Hill, 16, said "The youths of today just don't care anymore." Cindy Walters of West Forsyth added, "The desire and reward for learning is gone."

PROBLEM AT HOME

Lynn Morgan, 16, also of Hill said, "Maybe the main problem is at home. Many kids have to take over almost the whole house because the parents are working. Problems at home take a lot out of kids."

Dave Yount of East Forsyth agreed about youth apathy. "The students just don't care anymore about school or the way they do on tests." Grant page, also of East, said, "The parents and teachers are at fault. A lot of teachers are in it for the money, and some of the parents are against the busing, so they refuse to make the kids study as hard."

Some of the students criticized the Metropolitan Achievement Test itself, terming it too difficult, unfair, outdated. They also said it covers areas in which students taking it here have had no instruction.

"I think the scores are lower," said Tim Fishel of West Forsyth, "because the tests are based on what the northern schools have completed. The southern schools do not teach the same as the schools in the North, Midwest and West."

Some of the students said southern schools generally are inferior to northern schools. Northern schools make students work harder, some said.

Sixty-two students of West Forsyth participated in the poll; 14, Parkland; 14, North Forsyth; 20, East Forsyth; 4, Central; 22, Paisley; 20 each at Mount Tabor, Carver and Atkins; 19 each at Kennedy and Anderson; 17, Hill; 16, Hanes; and 7, Forsyth Country Day School. Reynolds Senior High School did not participate.

These are responses from other teens to the poll question, which was: "What do you think are the reasons that third, sixth and seventh grade students here have had declining scores on the Metropolitan Achievement Test for the past three years, falling below national norms in learning, especially in reading and math?":

Harry Ibergs, 15, Hill, "Students are just getting lazy. They do just enough to get by and that's it."

Penny Powers, 16, Hill, "Tests are no real and honest judge of knowledge. It's not that we can't learn, it's what they make us learn."

Jimmy Linebery, Kennedy, "I think the declining scores are caused by fright of the test."

Teressa Ervin, Kennedy, "The tests are very long, dull, and meaningless."

Kim Ragen, Kennedy, "The majority of kids aren't really learning the types of things that are on the test."

Kathy Kolb, 15, Mount Tabor, "The test is outdated, and the teachers aren't teaching the material which is on the test."

Dwayne Hendrix, 15, Mount Tabor, "It's because of the lab schools. They're good but too lenient and don't require work which is necessary."

Lorette Horne, 17, Carver High School, "Lots of kids fail these tests because the questions on the test are made up of what people think the teachers have taught the students, but really they haven't."

Thomas Mickens, 16, Carver, "Some of the questions on the reading test, I've never heard myself."

Floyd Chandler, Carver, "Some of the math problems are not just for third, sixth and seventh graders."

Ralph Blakes, Central, "When the teachers were transferred in the middle of the school year, the children were all mixed up and upset. It was like starting all over again. So kids got behind in their school work."

Cindy Waddell, Central, "When teachers try to make the students mind at school so they can learn, the children don't want to behave."

Johnny Sturdivant, Central, "All the school busing causes the children to be tired by the time they get to school, and then they're too tired to learn. It's so late when they get home at night that they eat and then it's time to go to bed, so they can't study at home."

Mamie Blackburn, Atkins, "The teachers aren't as strict as they used to be."

Boy, 18, Parkland, "They (students) go to so many different schools before reaching senior high that attention is based on schools rather than education."

Kathy Hine, Parkland, "The teachers are not teaching what the kids need to know to take the test."

Glenn Elson, Parkland, "They don't teach math and reading as such."

Pam Todd, West, "The teachers don't teach reading and writing and arithmetic anymore. They teach how to play and get along with other people. These are the things you should be taught at home, not at school."

Ellen Silver, West, "Many children reach the sixth or seventh grade without even knowing how to multiply."

David Hinshaw, West, "I think that lower scores are caused by crossbusing and possibly the new math."

Wayne Mock, West, "My guess would be that the reason for this (low scores) would be cross-busing."

Dana Fishburne, "The school system has been so involved in trying to achieve racial balance that it forgot about the business of education."

Paula Davenport, East, "The busing has messed everybody up. They've brought the high and low standards together and nothing is working out."

Cindy Giljames, Paisley "Because of the IMS Math program. My sister had to take that (in the sixth grade) and when she finished that year she didn't even know how to divide right!"

Lisa Mabry, Paisley, "I think it is because we have no (extensive) public kindergartens. From then on, they are a year behind."

Phyllis Knight, 15, Paisley, "I believe that busing is a large part of the problem because it not only contributes to the insecurity of the individual leaving his neighborhood, but it adds to overcrowding in schools."

Tommy Markushewski, Paisley, "I feel the main reason for these (score) drops is the individual learning method, which allows the students to loaf and waste time, and teachers who don't really care."

THE LEAGUE OF WOMEN VOTERS OF OMAHA, INC.,
Omaha, Nebr., February 18, 1974.

Senator SAM ERVIN,
Chairman, Judiciary Subcommittee on Constitutional Rights,
Washington, D.C.

SENATOR ERVIN AND MEMBERS OF THE JUDICIARY SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS: We wish to have this statement placed in the record of the public hearing focusing on legislative proposals to put an end to "forced" busing, specifically S 1737.

We strongly oppose any legislation which attempts to deny the use of transportation as one tool to achieve equality of access for all students to quality education.

In many communities, integration has been achieved only because these communities have been able to avail themselves of the option to bus. Although problems with parental acceptance may have existed in the early stages in these communities, assessment now indicates that the procedures are working well.

Omaha is currently involved in a desegregation suit. The Community Committee, appointed by the Omaha Board of Education to devise a plan for desegregation, realizes and has stated that some amount of transportation will be necessary to implement that plan. To deny to our community the option of using carriers for the purposes of integration would have the effect of undercutting the whole effort to desegregate.

We live in a multi-racial society and a multi-racial world. To isolate people by race is highly undesirable and is an obvious detriment to achieving stated national goals of mutual understanding and peace with all peoples and cultures.

Legislation which would prevent the courts from specifying transportation as a tool to desegregate; and which would prevent governmental agencies from taking a meaningful role in our societal attempt to integrate would be regressive legislation to say the least, and would undercut hard-won civil and constitutional rights.

MRS. D. G. TAYLOR, *President.*

CONCERNED NEIGHBORS, INC.,
Corpus Christie, Tex., February 20, 1974.

Hon. SAM ERVIN,
Chairman, Subcommittee on Civil Rights,
U.S. Senate, Washington, D.C.

DEAR SIR: I understand from Mr. Michael Miller, an aid to Senator Lloyd Bentsen, that your committee is or will soon be hearing testimony pertaining to forced busing of school children to achieve racial balance in our public schools in your consideration of bills S–287, S–1737, S–619 and S–179.

Our organization has a membership of over 20,000 people and we feel that since we represent a sizeable portion of our community we have an obligation to attempt to explain our position concerning efforts to bring about a more harmonious learning situation in our schools. Our school system has been in a state of turmoil for several years and there is little chance our situation will change unless legislation is forthcoming.

A brief history of our particular problem, I believe is in order. On July 22, 1968, Jose Cisneros and 22 other Mexican-American and Negro members of the Steel-Workers Union filed suit against the Corpus Christi School District. The Steel-Workers suit was financed by the union at the recommendation of their International Civil Rights Division. The suit charged that the school district operated a segregated system. Trial of the case began on May 14, 1970, in U. S. District Court. On June 4, 1970, U. S. District Judge Woodrow Seals entered a partial final judgment that held that the school district was operating a dual school system which segregated children by ethnic groups. Judge Seals entered a final judgment in the case on July 2, 1971. In this judgment the judge set forth a desegregation plan for the district. The district was ordered to put the plan into effect by the start of the 1971–72 school year. The plan involved what most of the community deemed as massive busing.

It is interesting to note that Jose Cisneros in his testimony before Judge Woodrow Seals stated that the Mexican-Americans did tend to stick very close together as far as housing patterns were concerned. He readily admitted that it was natural for people of the same ethnic background to congregate in particular geographic areas. What he did not say was that federally financed housing also tended to concentrate minority groups in particular geographical areas of the city. The school district contended all through the litigation that they had no control over where people lived and they considered it their job to give each student an opportunity to get the best education possible, not to attempt to change freedom of choice housing patterns.

On July 13, 1971, the school district appealed to the court for additional time in which to implement the desegregation plan. U. S. District Judge Owen Cox granted on July 16, 1971, extra time to implement the desegregation plan. The district was given until the start of the 1972–73 school year to implement the plan fully. Also on this date, the school district filed notice that it was appealing Judge Seals' final judgment. On July 19, 1971, Judge Cox entered a supplemental order stating that the stay order applied only to Mexican-American and Anglo children and that the delay was not intended to give the schools a year in which to do nothing.

The plaintiffs (Cisneros and others) filed notice on July 23, 1971, that they were appealing to the 5th U. S. Circuit Court of Appeals, asking that court to overrule Judge Cox and reinstate the original deadline for implementing the plan. On August 5, 1971, the court of appeals did strike down Judge Cox's stay order and once again the school district was under court order to implement the plan by the start of the 1971–72 school year. The school district asked the court of appeals on August 9, 1971, to reconsider its decision and grant additional time for putting the plan into effect. On August 10, 1971, the court of appeals refused to reconsider the school district's plea for additional time. So, on August 11, 1971, the school district appealed to the U. S. Supreme Court seeking a stay in the court-ordered desegregation plan.

On August 20, 1971, U. S. Supreme Court Justice Hugo L. Black granted a stay which would be in effect until the U. S. 5th Circuit Court of Appeals or the Supreme Court ruled on the merits of the entire case. Three days later, Judge Cox issued a new order which prevented the reassignment of about 1,000 Negro students, an expansion of the stay which had been given to Mexican-American and Anglo students on July 19. In February, 1972, the U. S. 5th Circuit Court of Appeals announced a delay in any decision until after the Supreme Court offered some guidance. The 5th Circuit Court of Appeals on April 27, 1972, enjoined the school district from constructing or renovating schools, funds for which had been voted in a bond election that year, until after the appeal was decided.

After hearing the school district's appeal "en banc", the court ruled on August 3, 1972, against the school district and agreed with the decision of Judge Seals that unconstitutional segregation existed in the district and ordered a new desegregation plan. Later that month, on August 23, Judge Cox ordered the district to produce a skeleton desegregation plan by September 15. The desegregation plan submitted by the district on the prescribed date called for reassigning 3665 students and the closing of one predominantly black school. The school district petitioned the U.S. Supreme Court on October 28, 1972, to review the case. On November 15, 1972, the plaintiffs called for a rejection of the school district's plan. Judge Cox, on May 8, 1973, rejected the district's plan, calling it "superficial" and ordered a new plan by June 11. Again, on the prescribed date, the school district entered a new plan which called for boundary changes immediately and more changes in the 1974–75 school year, including adding the ninth grade to high schools, creation of a sixth high school, closing of several schools and even further boundary changes. On June 25, 1973, the U.S. Supreme Court turned down the district's appeal for review of the case. On August 15, 1973, the U.S. District Court, after considering the objections of the plaintiffs and the defendants' reply, ruled that the June 11 plan be put into effect.

Then on December 5, 1973, the U.S. District Court ordered the school district to cease action to implement the revised plan for student assignment dated June 11. Certain changes which had already been made would remain in effect while others would not. The court instated a volunteer transfer program whereby eligible students could transfer from a school where they were members of an ethnic majority to a school where their ethnic group constituted a minority of the enrollment. Free transportation would be provided for those who wished to transfer if they lived more than two miles from the school they elected to attend. Space must be made available at the receiving school for the transferees. The court urged all involved to do their utmost to make the plan work. Evidence of no attempt to do all possible to implement the plan would result in the court's ordering more drastic measures.

The push for voluntary transfers as a means of carrying out the U.S. District Court's order of December 5, 1973, got off to a slow start. The school district held at least twelve well advertised meetings a week before the deadline for filing for transfer. These produced a total turnout of about 350 persons. These meetings were also advertised by spokesmen for the plaintiffs using the different media. Both the school district and the plaintiffs urged those eligible to take advantage of the volunteer transfer plan. By Sunday, January 27, 1974, there were a total of 382 students who had applied for transfer. Of these, 122 applied for permission to remain at the schools to which they already attended. In a school district comprised of approximately 45,000 students, this amounts to less than 1% of the total enrollment. Enrollment in our schools is made up of approximately 54% Mexican-American, 6% Negro and 40% Anglo American students. In the latest ruling by the courts, the Mexican Americans and Negro students were combined to make the total enrollment in our public schools 60% minority race students and 40% majority race students.

It is apparent from the fact that virtually no students have applied for transfers that the majority of the people in our community do not want the courts reassigning their children either voluntarily or involuntarily to schools other than their neighborhood schools.

Also, there has been approximately one-half million dollars spent collectively by the plaintiffs and the school district since the inception of this case for legal fees. This is money that could have been well spent in other areas where there is considerable need.

Based on the preceding facts, we ask that your committee recommend legislation to allow us to carry on our educational program the way the people of our community have demonstrated they desire and not as desired by a handful of people whose motives are questionable or as directed by unsympathetic courts. We believe that failure of the plaintiffs to generate interest in voluntary transfer from those whom they profess to represent exhibits the best case for the fact that almost all of the people in the community prefer that their children attend their neighborhood school.

Sincerely yours,

NEAL TURNER, *President.*

JUDICIAL DECISIONS AND BRIEFS

[In the Supreme Court of the United States, October Term, 1970]

AMICUS CURIAE BRIEF FOR THE CLASSROOM TEACHERS' ASSOCIATION OF THE CHARLOTTE-MECKLENBURG SCHOOL SYSTEM, INCORPORATED

(No. 281, James E. Swann, et al., *Petitioners*, v. Charlotte-Mecklenburg Board of Education, et al.; No. 349, Charlotte-Mecklenburg Board of Education, et al., *Petitioners*, v. James E. Swann, et al., on writ of certiorari to the U.S. Court of Appeals for the Fourth Circuit)

INTEREST OF THE AMICUS CURIAE

The Classroom Teachers' Association of the Charlotte Mecklenburg School System, Incorporated, is a non-profit membership organization in corporate form, which includes in its membership a substantial part of the 3,553 classroom teachers in the Charlotte-Mecklenburg School System and which devotes itself to the advancement of public education. The specific objectives of the organization and its members are to promote the interests of classroom teachers in the Charlotte-Mecklenburg School System, and to secure to the students attending the schools of the System opportunities to achieve by quality education their highest potentialities.

The Classroom Teachers' Association of the Charlotte-Mecklenburg School System and its members believe that the execution of the order of the United States District Court for the Western District of North Carolina and the judgment of the United States Circuit Court for the Fourth Circuit affirming such order in part seriously impair the educational opportunities offered by the Charlotte-Mecklenburg School System to the students in its schools, and for this reason the organization files this amicus curiae brief in support of the position of the Charlotte-Mecklenburg Board of Education, which harmonizes with this view.

The parties to the proceedings in Nos. 281 and 349 have consented in writing to the filing of this brief, and the writings evidencing such consent have been filed with the Clerk.

The members of the Supreme Court bar who submit this brief in behalf of the organization do so without compensation in the hope that they may aid the Supreme Court to reach a decision which will restore tranquility to much troubled areas of our land and enable the public schools operating in them to function economically and efficiently as educational institutions.

OPINIONS BELOW

The opinion of the Court below consists of the opinion and judgment of the United States Court of Appeals filed May 26, 1970, which are not yet reported and which appear in the Appendix (Volume 3, pages 1262a to 1304a).

In its opinion and judgment, the Court of Appeals reviewed and approved in part and remanded in part for further consideration the rulings and findings made by the United States District Court in the following orders and documents:

1. Order dated February 5, 1970 (819a–839a), as amended, corrected, and clarified on March 3, 1970 (921a).
2. Supplementary Findings of Fact dated March 21, 1970 (1198a–1220a).
3. Supplemental Memorandum dated March 21, 1970 (1221a–1238a).

JURISDICTION

The Supreme Court has jurisdiction to review this case by writ of certiorari under 28 U.S.C. 1254(1), and has accepted it for such purpose by granting writs to the petitioners in No. 281 and the petitioners in No. 349.

QUESTIONS PRESENTED FOR REVIEW

This case presents the following questions for review:

1. Does a public school board comply with the Equal Protection Clause of the Fourteenth Amendment when it creates non-discriminatory attendance districts or zones and assigns all children, black and white, to neighborhood schools in the district or zone in which they reside without regard to their race?
2. Does the Equal Protection Clause of the Fourteenth Amendment empower a federal court to order a public school board to assign children to the schools it operates to balance the student bodies in such schools racially or to bus children outside of nondiscriminatory attendance districts or zones to effect such purpose?
3. Does Title IV of the Civil Rights Act of 1964, which prohibits the assignment of students to public schools to balance the student bodies in such schools racially and to bus them from some schools to other schools or from some school districts to other school districts to effect such purpose, constitute appropriate legislation to enforce the Equal Protection Clause within the purview of the Fifth Section of the Fourteenth Amendment?
4. Does the order entered by the District Court and affirmed in part by the Circuit Court usurp and exercise the authority of the Charlotte-Mecklenburg Board of Education to devise and implement a non-discriminatory assignment plan conforming to the Equal Protection Clause, and require the Charlotte-Mecklenburg Board of Education to violate the Equal Protection Clause by treating in a different manner students similarly situated and by denying students admission to their neighborhood schools because of their race?

The amicus curiae insists that the first, third, and fourth questions must be answered in the affirmative and that the second question must be answered in the negative.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the first and second sections of the Fourteenth Amendment; the first and second sections of Article III of the Constitution; and Title IV of the Civil Rights Act of 1964. These constitutional and statutory provisions are printed in the Appendix.

STATEMENT OF THE CASE

A. The Charlotte-Mecklenburg Public School System

The writ in No. 281 and the writ in No. 349 present to the Supreme Court for review the judgment entered by the United States Court of Appeals for the Fourth Circuit on May 26, 1970, in the civil action entitled James E. Swann and others, Plaintiffs, v. Charlotte-Mecklenburg Board of Education and others, Defendants. For ease of narration and understanding, James E. Swann and his associates in this litigation are hereafter called the plaintiffs, and the Charlotte-Mecklenburg Board of Education is hereafter designated as the School Board.

The School Board operates the Charlotte-Mecklenburg Public School System in Charlotte and Mecklenburg County, North Carolina, political subdivisions of North Carolina. Charlotte, which is the county seat of Mecklenburg County, is inhabited by 239,056 persons who are concentrated within the 64 square miles embraced by its city limits, an area larger than the District of Columbia. Mecklenburg County embraces 550 square miles, has an east-west span of 20 miles, a north-south span of 36 miles, and has a population of 352,006, exclusive of those residing within the area embraced by Charlotte.

In the discharge of its state-assigned duties, the School Board operates 10 high schools, 21 junior high schools, and 72 elementary schools to house and instruct the 84,500 school children residing in Charlotte and Mecklenburg County. Of these school children, 24,000 or 29 percent, are black, and 60,500, or 71 percent, are white. Approximately 95 percent of all the black children who reside within the limits of the City of Charlotte live in predominantly black residential sections in northwest Charlotte, and a substantial portion of the other black children in Mecklenburg County reside in predominantly black residential areas adjacent to it. (293a–298a).

Prior to *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the School Board operated the public schools of Charlotte and Mecklenburg County as racially segregated schools in conformity with the interpretation then placed upon the Equal Protection Clause of the Fourteenth Amendment. Subsequent to the *Brown Case* and prior to 1965, the School Board established an effective system of determining admission to its public schools on a non-racial basis. It did this, and thus converted its formerly dual system into a unitary system by establishing non-discriminatory attendance districts or zones, and assigning the school children subject to its jurisdiction to their neighborhood schools irrespective of race.

Inasmuch as some of the attendance districts or zones in rural Mecklenburg County and some of its suburban residential districts or zones in or adjacent to Charlotte are extremely large, the School Board voluntarily established a transportation system for the sole purpose of carrying children residing in these geographically large districts or zones to the nearest available schools. As a consequence, it now uses 280 buses to bus some 23,000 school children to rural and suburban schools. (864a)

In 1965 the plaintiffs brought the instant action against the School Board in the United States Court for the Western District of North Carolina seeking to obtain a compulsory desegregation decree. After hearing the evidence in the case, the District Court found that the School Board had complied with the requirement of the Equal Protection Clause and denied the decree sought by them. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 243 F.Supp. 667 (1965). This ruling was affirmed by the Circuit Court. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 369 F.2d 29 (1966).

B. The plan submitted by the Charlotte-Mecklenburg Board of Education

Subsequent to the decision of *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), the plaintiffs filed a motion in the cause seeking further desegregation. (2a)

Although it found as a fact that the "location of schools in Charlotte has followed the local pattern of residential development, including its de facto patterns of segregation" (305a), and that the School Board members "have achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts and have exceeded the performance of any school boards whose actions have been reviewed in the appellate court decisions" (311a–312a), the District Court resumed hearings in the case on the ground that the *Green Case* had changed "the rules of the game." (312a)

It is to be noted that subsequently the District Court on its own motion reversed its previous findings that any racial imbalance in the Charlotte-Mecklenburg public schools was the result of de facto segregation by asserting that "there is so much State action imbedded in and shaping these events that the resulting segregation is not innocent or 'de facto' and the resulting schools are not 'unitary' or 'desegregated'." (662a) The amicus curiae submits with all due deference that there is no testimony in the record to sustain this particular finding.

Pursuant to the orders entered by the District Court on April 23, 1969 (285a), June 20, 1969 (448a), August 15, 1969 (579a), and December 1, 1969 (698a), the School Board filed desegregation plans (330a, 480a, 670a) which were rejected by the District Court.

Meanwhile on December 2, 1969, the Court appointed Dr. John Finger, a resident of Rhode Island, as a special consultant to devise a desegregation plan for the guidance of the Court. (819a) Dr. Finger had originally entered the case as a partisan witness for the plaintiffs, and for this reason a good case can be made for the proposition that he lacked the impartiality which is desirable in one selected for the task of assisting a judge in keeping the scales of justice evenly balanced between adverse litigants. (1279a)

While the District Court orders and the School Board plans mentioned above shed light on the School Board's devotion to the neighborhood school concept, and its reluctance as an elected public body to engage in excessive and expensive busing of school children, the subsequent School Board plan of February 5, 1970, and the subsequent District Court order of February 5, 1970, relating to it really illuminate the issues which now confront the Supreme Court. (726a–748a, 819a–839a).

By this plan, the School Board proposed that attendance districts or zones should be drastically gerrymandered in such a manner as to include as many blacks as possible in each district or zone, and that all school children subject to its jurisdiction should be required to attend the school appropriate to their educational standings in the district or zone of their residence. The plan would have accomplished a racial mixture of school children in all of the 103 schools in the system, except three elementary white schools located in neighborhoods inhabited exclusively by members of the white race. (726a–748a)

The School Board plan contemplated that from 17 percent to 36 percent of the student body in nine of the ten senior high schools in the system would be black; that not more than 38 percent of the student body in 20 of the 21 junior high schools in the system would be black; and that not more than 40 percent of the student body in 60 of the 72 elementary schools in the system would be black.

Under the School Board plan, the remaining high school, Independence High, would be 2 percent black and 98 percent white; the remaining junior high school, Piedmont Junior High, would be 90 percent black and 10 percent white; and all of the 12 remaining elementary schools, except the three white elementary schools, would be 83 percent to 1 percent black. (726a–748a)

The School Board judged it to be impossible to desegregate the three white elementary schools, and to further desegregate the nine predominantly black elementary schools by geographic districting or zoning because of the de facto segregation prevailing in the residential areas in which the children assigned to these 12 elementary schools lived. (730a–732a) The District Court made a specific finding in its Supplemental Findings of Fact of March 21, 1970, which establishes the validity of the School Board's conclusion concerning Independence High, Piedmont Junior High, and the 9 predominantly black elementary schools, all of which are located in northwest Charlotte or its environs.

The District Court expressly found that "both Dr. Finger and the School Board staff appear to have agreed, and the Court finds as a fact that for the present at least there is no way to desegregate the all-black schools in northwest Charlotte without providing (or continuing to provide) bus or other transportation for thousands of children. All plans and all variation of plans considered for this purpose lead in one fashion or another to that conclusion." (1208a)

The amicus curiae submits that it beggars imagination to conjecture how any plan could have obtained a greater degree of racial integration by gerrymandering attendance districts or zones in a political subdivision where white children outnumber black children 71 to 29, and where most of the black children are concentrated residentially in an area inhabited exclusively by members of their race.

The School Board plan did not stop with proposing such a high degree of racial integration among the student bodies in the schools subject to its jurisdiction. It made these three additional proposals:

1. That the faculty of each school should be assigned in such a manner that the ratio of black teachers to white teachers in each school would be approximately 1 to 3 in accordance with the ratios in the entire faculty of the system (737a);

2. That the School Board should furnish 4,935 additional students in-district or in-zone transportation to the schools in the proposed gerrymandered attendance districts or zones in accordance with the North Carolina law which forbids such transportation within one and one-half mile distances (736a); and

3. That any black child in any school having more than 30 percent of his race in its student body should be allowed to transfer to any school having less than 30 percent of his race; whereas a white child should be permitted to transfer to another school only if the school he is attending has more than 70 percent of his

race and the school to which he seeks transfer is less than 70 percent white. (734a–735a)

At the same time, Dr. Finger submitted to the District Court his plan of desegregation which contemplated that the School Board should be required by the Court to deny approximately 23,000 additional children admission to the neighborhood schools in the districts or zones of their residence, and to transport them by bus or otherwise substantial distances in order to produce a greater racial mixture in student bodies. (819a, 825a–827a, 829a–839a, 1198a, 1208a–1214a, 1231a–1234a, 1268a–1269a)

C. The Order of the District Court

On February 5, 1970, the District Court entered an order approving the School Board plan, subject to certain drastic conditions and revisions recommended by Dr. Finger. (819a–839a) By adopting these conditions and revisions, the District Court commanded the School Board to do these things:

1. To deny hundreds of black high school students admission to a nearby high school which would have had a racial composition of 36 percent black and 64 percent white under the School Board plan, and to bus them from their residences in northwest Charlotte through center-city traffic a distance of some 12 or 13 miles to Independence High School, which is located in a white suburban residential area;

2. To deny several thousands of black junior high school students admission to their neighborhood junior high schools in the inner city, and to bus them substantial distances to nine predominantly white suburban schools located in other attendance districts or zones; and

3. To deny thousands of black and thousands of white elementary school children admission to 31 elementary schools located within their respective attendance districts or zones, and to bus them distances approximating 15 miles to elementary schools situated in other attendance districts or zones.

The sole purpose of the District Court in ordering the School Board to dislocate and bus the hundreds of black high school students to Independence High School was to make Independence High less white, and the sole purpose of the District Court in ordering the School Board to dislocate and bus several thousands of junior high school students was to reduce the percentage of blacks in Piedmont Junior High from 90 percent to 32 percent. (825a–826a)

The sole purpose of the order of the Court commanding the School Board to dislocate and bus thousands of elementary school children was to alter the racial composition of the student body in 9 predominantly black inner-city schools and in 24 predominantly white suburban schools. To accomplish this purpose, the District Court commanded the School Board to dislocate and bus thousands of black first, second, third, and fourth grade students from 9 predominantly black inner-city schools to 24 predominantly white suburban schools, and to dislocate and bus thousands of white fifth and sixth grade students from the 24 predominantly white suburban schools to the 9 predominantly black inner-city schools. (826a)

The order of the District Court did not stop with these things. It further ordered the School Board to establish and implement a continuing program of assigning students throughout the school year "for the conscious purpose of maintaining each school * * * in a condition of desegregation." (824a)

The record clearly discloses the reasoning which prompted the District Court to seek to achieve the purposes of its order.

Prior to its order of February 5, 1970, namely, on April 24, 1969, the District Court manifested its disapproval of the School Board's adherence to the neighborhood school concept by this statement: "Today people drive as much as 40 or 50 miles to work; 5 to 10 miles to church; several hours to football games; all over the country for civic affairs of various types. The automobile has exploded the old-fashioned neighborhood * * * If this Court were writing the philosophy of education, he would suggest that educators should concentrate on planning schools as educational institutions rather than as neighborhood proprietorships." (306a)

When it entered its order of February 5, 1970, the District Court justified adding the conditions and revisions recommended by Dr. Finger on the ground that the School Board plan "relies almost entirely on geographical attendance zones," while "the Finger plan goes further and produces desegregation of all the schools in the system." (819a)

What has been said makes it manifest that the District Court entertained the opinion that the Equal Protection Clause of the Fourteenth Amendment makes it obligatory for a school board to mix student bodies racially in every school subject to its jurisdiction if children are available for mixing, and that a school board must deny a sufficient number of school children admission to their neighborhood schools and bus them to schools elsewhere either to overcome racial imbalances in their neighborhood schools or in the schools elsewhere, regardless of whether such racial imbalances are produced by arbitrary or invidious discrimination on the part of the school board or simply result from adventitious de facto residential segregation or other cause.

The amicus curiae has not undertaken to state with exactitude the number of additional school children which the District Court ordered the School Board to deny admission to their neighborhood schools and to bus from one school to another or from one school district to another, or the additional cost which the carrying out of the District Court's order in this respect will impose upon the School Board.

This action of the amicus curiae has been deliberate because these matters are in serious dispute between the School Board and the District Court.

When the District Court entered its order of February 5, 1970, and thereby adopted the Finger plan in virtually its entirety, the School Board estimated that the order required it to bus 23,384 additional students an average round trip of 30 miles each school day, and that to do this the School Board would have to acquire 526 additional buses and additional parking spaces at an original capital outlay of $3,284,448.94; and thereafter expend each year an additional $1,065,391.98 in employing additional personnel and defraying other operating costs. (853a, 866a)

On March 3, 1970, the District Court modified its order of February 5, 1970. (921a) The School Board then calculated that the order as modified will require it to transport 19,285 additional students and to purchase for such purpose 422 additional buses and additional parking spaces at an original capital outlay of $2,369,100.00; and thereafter to expend each year for additional personnel and operating expenses of such buses $284,000.00. (1269a–1270a)

The Court estimated that the execution of its order as modified would require the School Board to bus 13,300 additional students and to purchase for use 138 additional buses at an original capital outlay of $745,200.00; and to expend thereafter annually $266,000.00 for operating costs of such additional buses, exclusive of what it will have to expend to compensate any additional personnel necessary for their operation. (1259a–1261a, 1269a)

The Court arrived at its figures by suggesting that the School Board could reduce its estimate of the expenses incident to busing the thousands of children affected by its order by drastically staggering school openings and closings. The School Board replied to this suggestion by asserting that the suggested staggering of school openings and closings would require some children to leave home as early as 6:30 a.m. and prevent some of them from returning home before 5:00 p.m. (864a–865a)

D. The Judgment of the United States Court of Appeals for the Fourth Circuit

At the instance of the School Board, the United States Court of Appeals for the Fourth Circuit reviewed the orders of the District Court. On May 26, 1970, the Circuit Court rendered its judgment affirming the orders of the District Court insofar as they related to the assignment and busing of senior high school and junior high school students, and remanding to the District Court for further consideration the provisions of the District Court relating to the assignment and busing of elementary school students. (1262a–1304a)

In making this remand, the Circuit Court adjudged that "not every school in a unitary system need be integrated," and adopted a "test of reasonableness—instead of one that calls for absolutes." (1267a)

The writ of certiorari granted to the School Board presents for review the validity of the Circuit Court ruling approving the orders of the District Court relating to the assignment and busing of senior high school and junior high school students and the writ of certiorari granted to the original plaintiffs presents for review the question of the validity of the ruling of the Circuit Court vacating the order of the District Court relating to the assignment and busing of elementary school students.

Subsequent to these events, namely, on August 3, 1970, the District Court reinstated and reaffirmed its order of February 5, 1970, in respect to the assignment and busing of the elementary school students. (1320a) While the validity of this particular order may not be before the Supreme Court, the question which it raises is involved in the matter to be reviewed under the writ granted to James E. Swann and those associated with him in this litigation.

The amicus curiae understands that the School Board has filed an yet unprinted motion with the Supreme Court for a stay of the order entered by the District Court on August 3, 1970, after the hearing of the case in the Circuit Court.

SUMMARY OF AGREEMENT

In the final analysis, the questions presented for review in this case do not arise out of any real controversy in respect to the testimony. They arise out of a fundamental disagreement between the School Board, on the one hand, and the District Court and some of the Circuit Court Judges, on the other, with respect to how the Equal Protection Clause applies to the assignment of students to public schools.

The view of the School Board may be epitomized in this fashion:

The Equal Protection Clause applies only to State action which is arbitrary or invidious, and, hence, it leaves a public school board, acting as a State agency, entirely free to assign students to its schools by any method satisfactory to itself if such method is not arbitrary or invidious. A public school board acts arbitrarily or invidiously if it assigns students to its schools for racial reasons, but a public school board does not act arbitrarily or invidiously if it assigns students to its schools for non-racial reasons, such as the promotion of the efficiency of school administration, the economy of school administration, or the convenience of the students or their parents. This being true, the Equal Protection Clause does not impair in any way the power of a public school board to create fairly drawn geographic attendance districts or zones, and to assign all students without regard to their race to neighborhood schools in the respective districts or zones in which they reside even though such action may result in some racial imbalances in the schools serving areas predominantly inhabited by members of one race.

The view of the District Court and some of the Circuit Court Judges may be summarized in this way:

It is highly desirable from an educational viewpoint to mix students in public schools racially in the highest possible degree. Hence, the Equal Protection Clause imposes upon a public school board the positive duty to balance racially all the schools it operates if black and white children are available for this purpose; and to deny school children admission to their neighborhood schools and bus them to other schools in other areas, no matter how distant, in sufficient numbers to effect such racial balancing.

The School Board refutes this proposition by saying that the Equal Protection Clause does not require action which may be desirable; it merely prohibits action which is arbitrary or invidious.

When it is stripped of irrelevancies and surmises, the record discloses a surprisingly simple state of facts which are relatively free of conflict insofar as they relate to the crucial issues.

After the first *Brown Case*, 347 U.S. 483 (1954), the School Board converted its previously dual system of schools into a unitary system of schools within which no child was excluded because of the child's race. The School Board did this by a geographic assignment plan applicable in like manner to all children without regard to their race. Its action in this regard was adjudged to be in compliance with the Equal Protection Clause by both the District Court and the Court of Appeals.

Subsequent to the *Green Case*, 391 U.S. 430 (1968), the District Court ordered the School Board to submit another plan for the desegregation of its schools. Pursuant to this order, the School Board proposed a plan which was reasonably designed to secure the maximum amount of racial mixture obtainable in the student bodies in its schools without abandonment of the neighborhood school concept by restructuring its geographic attendance districts or zones, and assigning all of the children subject to its jurisdiction without regard to their race to their respective neighborhood schools in the districts or zones in which they reside.

The Court rejected the School Board plan simply because it did not racially balance one senior high school out of the system's ten senior high schools, one junior high out of the system's 21 junior high schools, and nine predominantly black and three predominantly white elementary schools out of the system's 72 elementary schools.

Instead of approving the reasonable plan submitted by the School Board, the District Court, in essence, adopted the Finger Plan which requires the School Board to deny thousands of children admission to their neighborhood schools, and to bus them to other schools in other areas merely to eliminate the racial imbalances in these particular schools. The School Board insists that the action of the District Court was not only inconsistent with the Equal Protection Clause, but violates Title IV of the Civil Rights Act of 1964, and that the Circuit Court erred insofar as it approved the action of the District Court.

ARGUMENT

I

"The Charlotte-Mecklenburg Board of Education has complied with the Equal Protection Clause of the Fourteenth Amendment and the Supreme Court decisions interpreting it by establishing and operating a unitary public school system, which receives and teaches students without discrimination on the basis of their race or color. Any racial imbalance remaining in any of the schools under the jurisdiction of the Board represents de facto segregation, which results from the purely adventitious circumstances that the inhabitants of particular areas in and adjacent to the city of Charlotte are predominantly of one race."

The Equal Protection Clause of the Fourteenth Amendment, which was certified to be a part of the Constitution on July 28, 1868, forbids a state to "deny to any person within its jurisdiction the equal protection of the laws."

By these words, the Equal Protection Clause requires a state to treat in like manner all persons similarly situated. *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U.S. 527 (1931); *Maxwell v. Bugbee*, 250 U.S. 525 (1919). The clause does not require identity of treatment. *Walters v. St. Louis*, 347 U.S. 231 (1934). It permits a state to make distinctions between persons subject to its jurisdiction if the distinctions are based on some reasonable classification, and all persons embraced within the classification are treated alike. It merely outlaws arbitrary or invidious discrimination. *Avery v. Midland County*, 390 U.S. 474 (1968); *Missouri Pacific Railway Co. v. Mackey*, 127 U.S. 205 (1888).

From July 28, 1868, until May 17, 1954, the Equal Protection Clause of the Fourteenth Amendment was interpreted to sanction the "separate but equal doctrine," which permitted a state to segregate school children in its public schools on the basis of race when it furnished equal facilities for the education of the children of each race. *Gong Lum v. Rice*, 275 U.S. 78 (1927); *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

On May 17, 1954, the Supreme Court handed down its historic decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), adjudging "that in the field of public education the doctrine of 'separate but equal' has no place" and holding that a state violates the Equal Protection Clause if it denies any child admission to any of its public schools on account of the child's race.

On the same day the Supreme Court handed down *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), ruling that the Due Process Clause of the Fifth Amendment imposes the same inhibition on the public schools of the District of Columbia that the Equal Protection Clause does on the public schools of a state, and one year later the Supreme Court announced its implementing decision in second *Brown*, which is reported as *Brown* v. *Board of Education of Topeka*, 348 U.S. 294 (1955).

Since these decisions the Supreme Court has applied the Equal Protection Clause to varying factual situations arising in various Southern public school districts in the following cases: *Cooper* v. *Aaron*, 358 U.S. 1, 20 (1958); *Shuttlesworth* v. *Birmingham Board of Education*, 358 U.S. 101 (1958); *Bush* v. *Orleans Parish School Board*, 364 U.S. 500 (1960); *Watson* v. *City of Memphis*, 373 U.S. 526 (1963); *Goss* v. *Board of Education of Knoxville*, 373 U.S. 683 (1963); *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Bradley* v. *School Board of City of Richmond*, 382 U.S. 103 (1965); *Rogers* v. *Paul*, 382 U.S. 198 (1965); *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968); *Raney* v. *Board of Education of the Gould School District*, 391 U.S. 443 (1968); *Monroe* v. *Board of Commissioners of the City of Jackson*, 391 U.S. 450 (1968); *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969); *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Dowell* v. *Board of Education of the Oklahoma City Public Schools*, 396 U.S. 269 (1969); *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 226 (1969), *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970); and *Northcross* v. *Board of Education of the Memphis City Schools*, 397 U.S. 232 (1970).

Besides, individual Supreme Court Justices, acting as Circuit Justices, have expressed opinions on the subject in these cases: *Board of School Commissioners of Mobile County* v. *Davis*, 11 L. ed. 2d 26 (1963); *Keyes* v. *School District No. 1, Denver*, 396 U.S. 1215 (1970); and *Alexander* v. *Holmes County Board of Education*, 396 U.S. 1218 (1969).

The record in the instant case embraces hundreds of pages of evidence, orders, and judgments, and for that reason, the case lends itself to much writing. But the issues arising in the case are simple, and it would complicate that simplicity to analyze the cited decisions in detail. In their ultimate analysis, they interpret the Equal Protection Clause as follows:

1. The Equal Protection Clause makes it unconstitutional for a state to deny any child admission to any public school it operates on account of the child's race.

2. In consequence, the Equal Protection Clause imposes upon a State, acting through its appropriate agencies, the responsibility to establish a system of determining admission to its public schools on a non-racial basis.

3. A state, which operated a racially segregated system of public schools on May 17, 1954, fulfills this responsibility by converting its dual public school system into a unitary public school system.

4. A unitary public school system is one "within which no person is to be effectively excluded from any school because of race or color."

When the Equal Protection Clause as thus interpreted is applied to the facts in this case, it is obvious that the School Board has fully converted its *Pre-Brown* dual school system into a unitary school system within which no child is actually excluded from any school because of race or color. The School Board has done this by creating non-discriminatory attendance districts or zones and assigning all children, black and white, to neighborhood schools in the district or zone in which they reside without regard to their race.

These conclusions are explicit in the rulings made by the District Court and the Circuit Court in 1965 and 1966. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 243 F.Supp. 667 (1965), *Swann* v. *Charlotte-Mecklenburg Board of Education*, 369 F.2d (1966). They are implicit in the findings made by the District Court in its order of April 23, 1969, that the School Board had "achieved a degree of desegregation of schools apparently unsurpassed in these parts" and had "exceeded the performance of any school board whose actions have been reviewed in the appellate court decisions," (311a–312a) and that the Schools of Charlotte, in essence, conform to de facto patterns of residential segregation. (305a)

To be sure, the District Court, acting *sua sponte*, undertook to recall these findings in its Memorandum Opinion of November 7, 1969, and to assert that racial imbalances in the Schools of Charlotte are "not innocent or *de facto*." (662a)

The amicus curiae submits in all earnestness that there is no evidence in the record to sustain the District Court's assertion in this respect. Be this as it may, the Supreme Court is empowered in cases of an equitable nature and cases involving constitutional questions to review the evidence and make its own findings. If it follows this course in this case, the Supreme Court will be impelled to the conclusion that there is not a vestige of state-imposed segregation in the Charlotte-Mecklenburg School System.

Besides, the District Court's assertion that racial imbalances in the schools of Charlotte are "not innocent or *de facto*" is totally repudiated by its subsequent finding that there is no way to desegregate the black schools in northwest Charlotte without transporting thousands of children by bus or other means. (1208a)

When all is said, the School Board went far beyond the call of any duty imposed upon it by the Equal Protection Clause when it proposed in its plan of February 2, 1970, to gerrymander attendance districts or zones in order to achieve the highest degree of desegregation obtainable without virtual abandonment of the neighborhood school concept. The amicus curiae expresses no opinion as to whether this proposal is repugnant to the constitutional or legal rights of any child.

II

"The Equal Protection Clause of the Fourteenth Amendment does not require or empower a Federal Court to order a public school board to assign children to the schools it operates merely to balance the student bodies in such schools racially, or to bus children outside reasonable geographic attendance districts or zones to effect such purpose. The District Court ordered the Charlotte-Mecklenburg School Board to do both of these things, and the Circuit Court erred insofar as it affirmed the District Court order."

The facts make it clear that the order entered by the District Court on February 5, 1970, requires racial balancing in the Charlotte-Mecklenburg School System and the busing of thousands of children outside their geographic attendance districts or zones to effect such balancing.

Indeed, the District Court virtually admits this to be true by setting forth in its Supplemental Findings of Fact of March 21, 1970, a specific finding that there is no other way to desegregate the black schools in northwest Charlotte. (1208a)

Upon the entire record, the conclusion is inescapable that the District Court fell into error because it honestly believed that the Equal Protection Clause and certain decisions interpreting it impose upon a public school board an absolute duty to do these things:

1. To balance racially to the highest degree possible all the schools subject to its control if black and white children are available for that purpose anywhere within the territory subject to its jurisdiction, no matter how vast such territory may be; and

2. To effect such racial balancing by denying both black and white children admission to their neighborhood schools and busing them to other schools in other areas in sufficient numbers to overcome racial imbalances either in their neighborhood schools or in the other schools, regardless of whether the racial imbalances result from de facto residential segregation or other cause, and regardless of these other factors: the distances the children are to be bused, the time required for their busing, the impact of their exclusion from their neighborhood schools and their busing upon their minds and hearts, the effect of these things upon the management of the homes which must nurture them, the traffic hazards involved, and the additional expense foisted upon heavily burdened taxpayers.

There is no other rational explanation for the court order which disrupts the lives of thousands of school children and the management of the thousands of homes from which they come, and diverts tremendous sums of tax-raised moneys from the enlightenment of their minds to the busing of their bodies.

The Equal Protection Clause does not require any court to enter any such order. It does not empower any court to enter any such order. Indeed, it forbids any court to do so.

As interpreted in the first *Brown Case*, 347 U.S. 483 (1954), and all subsequent Supreme Court decisions relevant to the subject, the Equal Protection Clause forbids a public school board, which acts as a state agency, to deny any child admission to any school it operates on account of the child's race. A public school board obeys the Clause by maintaining a unitary school system, i.e., a school system "within which no person is to be effectively excluded from any school because of race or color." *Northcross* v. *Board of Education of the Memphis City Schools*, 397 U.S. 232 (1970); *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969). See also the opinion of Mr. Justice Black, acting as Circuit Justice, in *Alexander* v. *Holmes County Board of Education*, 396 U.S. 1218 (1969).

The power to assign children to state supported schools belongs to the public school board which operates them. The Equal Protection Clause does not undertake to transfer this power to the Federal Courts. It merely subjects the exercise of the power by the public school board to this limitation: The board must not exclude any child from any school it operates because of the child's race.

If it faithfully observes this limitation upon its power, a public school board has the right to assign children to the schools it operates in any non-discriminatory fashion satisfactory to itself.

The School Board exercised this right when it created nondiscriminatory attendance districts or zones and assigned all children, whether black or white, to neighborhood schools in the districts or zones of their residence without regard to race.

Since the children are similarly situated and the School Board treats them exactly alike, its action is in complete harmony with the Equal Protection Clause. It accords, moreover, with the implementing decision in the second *Brown Case*, 349 U.S. 294 (1955), which expressly recognizes that a school board may employ non-discriminatory geographic zoning of school districts "to achieve a system of determining admission to the public schools on a nonracial basis.

As is true in respect to virtually every city of any size in our land, the different races are concentrated to a substantial degree in separate residential areas in Charlotte, and for this reason the School Board's non-discriminatory geographic zoning and assignment program necessarily results in some racial imbalances in some schools.

Notwithstanding this, the order of the District Court commanding the School Board to exclude thousands of children from their neighborhood schools and to bus them long distances to other schools to overcome these racial imbalances is without support in the Equal Protection Clause.

This is true for an exceedingly plain reason. The Equal Protection Clause does not prohibit any discrimination except that which is arbitrary or invidious.

It inevitably follows that where school attendance areas are not arbitrarily or invidiously fixed so as to include or exclude children of a particular race, the Equal Protection Clause does not prohibit a state or local school board from requiring that the children living in each attendance area attend the school in that area, even though the effect of such a requirement, in a locality where the different races are concentrated in separate residential areas, is racial imbalance or de facto segregation in the schools.

The conclusion that the Equal Protection Clause does not impose upon a public school board any mandate to remove any racial imbalance in its schools occasioned by de facto residential segregation or non-discriminatory geographic assignments is expressly supported in *Bell* v. *School Board of Gary, Ind.* (7 CA–1963), 324 F. 2d 209, and *Downs* v. *Board of Education of Kansas City, Kansas* (10 CA–1964), 336 F.2d 998. Moreover, it is compelled by first *Brown*, 347 U.S. 483 (1954), and all the subsequent Supreme Court cases applying its holding, as well as by the language of the Equal Protection Clause itself.[1]

Despite the fact that the Charlotte-Mecklenburg School System is in the South, racial imbalances produced in its schools by de factor residential segregation are just as innocent as racial imbalances produced in the public schools of the North by the same cause, and are equally exempt from federal interference, whether legislative, executive, or judicial, under the Equal Protection Clause, which, as already pointed out, condemns no discrimination except that which is arbitrary or invidious.

The amicus curiae is confident that the Supreme Court will so adjudge. Indeed, it must do so if the United States is truly one nation under one flag and one Constitution.

It no longer comports with intellectual integrity to call all racial imbalances in the public schools of the South de jure, and all racial imbalances in the public schools of the North de facto.

There is now no de jure school segregation anywhere in our land. Racial imbalances in public schools are either arbitrary or invidious and, hence, constitutionally impermissible, both North and South, or innocent and, hence, constitutionally permissible both North and South. Racial imbalances resulting from de facto residential segregation or non-discriminatory districting or zoning, whether in the North or in the South, are clearly innocent and constitutionally permissible.

Moreover, it no longer comports with reality, common sense, or justice to apply one rule to the North and another to the South because the South did not precede the Supreme Court in discovering that the "separate, but equal doctrine" had ceased to be the law of the land.

III

"The Fifth Section of the Fourteenth Amendment Empowers Congress to Enforce the Equal Protection Clause by Appropriate Legislation, the First Section of Article III of the Constitution Empowers Congress to Regulate the Jurisdiction of United States District Courts and United States Circuit Courts of Appeals, and the Second Section of Article III of the Constitution Empowers Congress to Regulate the Appellate Jurisdiction of the Supreme Court. Congress Exercised all of These Powers in an Appropriate Fashion When it Enacted Title IV of the Civil Rights Act of 1964, Which Prohibits the Assignment of Students to Public Schools to Balance the Student Bodies in Such Schools Racially, and to bus Them From Some Schools to Other Schools, or From Some School Districts to Other School Districts to Effect Such Purpose. The Act's Prohibition on Busing is Absolute and Deprives Federal Courts of Jurisdiction to Compel School Boards to Bus Students to Overcome Racial Imbalances in

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[1] While such action may not be customary in briefs, the amicus curiae wishes to note that this conclusion is supported by the text writer in 15 Am. Jur. 2d, Civil Rights, Section 39, Page 433, and by one of the most recent commentaries on the Constitution of the United States, i.e., Bernard Schwartz's "Rights of the Person," Volume II, Section 501, Page 593–596.

Schools, Even if Such Imbalances Result From Discriminatory School Board Action. The District Court Order Violated This Act by Commanding the Charlotte-Mecklenburg School Board to do the Things Prohibited by it, and the Circuit Court Joined in Such Violation Insofar as it Affirmed the District Court Order."

The Equal Protection Clause is limited in objective and operation. It imposes this duty and this duty only on a state, i.e., to treat in like manner all persons similarly situated.

In consequence, it forbids a public school board, acting as a state agency, to exclude any child from any school because of the child's race.

Further than that it does not go. It does not rob any public school board of its inherent authority to assign children of any race to their neighborhood school if the school board acts for reasons other than racial reasons, such as a purpose to promote ease of school administration, convenience of the children and the homes from which they come, or economy of operation.

Hence, it does not empower federal courts to deny children of any race admission to their neighborhood schools and to bus them to other schools in other areas to remedy racial imbalances in their neighborhood schools or the other schools arising out of the residential patterns of their neighborhoods or of the other areas.

And, above all things, the Equal Protection Clause does not intend that little children, black or white, shall be treated as pawns on a bureaucratic or judicial chess board.

When it enacted Title IV of the Civil Rights Act of 1964 to enforce the Equal Protection Clause, Congress recognized the validity of these observations concerning the meaning of the Equal Protection Clause. Moreover, it was not oblivious to the inescapable reality that the different races are concentrated to substantial degrees in separate residential areas throughout the nation, and that it would be virtually impossible to keep the public schools of the country racially balanced, even if the Equal Protection Clause did not prohibit such action.

For these reasons, Congress vested in the Commissioner of Education, the Attorney General, and the Federal Courts certain responsibilities regarding what it called the desegregation of public education, but limited the powers of the Commissioner of Education and the Attorney General, and the jurisdiction of the Federal Courts to keep them within constitutional bounds.

Congress was authorized to do these things by the Fifth Section of the Fourteenth Amendment, which expressly empowers Congress to "enforce by appropriate legislation" the Equal Protection Clause; the First Section of Article III of the Constitution, which authorizes Congress to prescribe the jurisdiction of the inferior courts created by it, *Chisholm v. Georgia*, 2 Dall. (U.S.) 419, 432 (1793); *Turney v. Bank of North America*, 4 Dall. (U.S.) 8 (1799); *Ex Parte Bollman*, 4 Cranch (U.S.) 75, 93 (1807); *Cary v. Curtis*, 3 How. (U.S.) 236, 245 (1845); *Sheldon v. Still*, 8 How. (U.S.) 441 (1850); *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922); *Lauf v. E. G. Skinner & Co.*, 303 U.S. 323, 330 (1938); *Lockerty v. Phillips*, 319 U.S. 182 (1943); and *Yankus v. United States*, 321 U.S. 414 (1944); and the Second Section of Article III of the Constitution, which vests Congress with legal power to regulate the appellate jurisdiction of the Supreme Court, *Wiscart v. D'Auchy*, 3 Dall. (U.S.) 321 (1796); *Durousseau v. United States*, 6 Cranch 309 (1810); *Barry v. Mercein*, 5 How. (U.S.) 103, 119 (1847); *Daniels v. Railroad Co.*, 3 Wall. (U.S.) 250, 254 (1866); *Ex Parte McCardle*, 6 Wall. (U.S.) 318 (1868); *The Francis Wright*, 105 U.S. 381, 386 (1882); *Kuntz v. Moffitt*, 115 U.S. 487, 497 (1885); *Cross v. Burke*, 146 U.S. 82, 86 (1892); *Missouri v. Pacific Railway Co.*, 292 U.S. 13, 15 (1934); and *Stephan v. United States*, 319 U.S. 423, 426 (1943).

The conclusion that Title I of the Civil Rights Act of 1964 is designed to enforce the Supreme Court rulings that the Equal Protection Clause forbids a school board, acting as a state agency, to deny any child admission to any school it operates because of the child's race is vindicated by the legislative history of the Act, as well as by its language.

During the course of the debate on the bill which became the Civil Rights Act of 1964, Senator Byrd of West Virginia addressed this question to Senator Humphrey, the floor manager of the bill, and received this reply from Senator Humphrey:

"Mr. BYRD, of West Virginia. Can the Senator from Minnesota assure the Senator from West Virginia that under Title VI school children may not be bused from one end of the community to another end of the community at the taxpayers' expense to relieve so-called racial imbalance in the schools?" [2]

"Mr. HUMPHREY. I do." [3]

Senator Humphrey made these further statements relating to the purposes of the bill:

"Mr. HUMPHREY. Mr. President, the Constitution declares segregation by law to be unconstitutional, but it does not require integration in all situations. I believe this point has been made very well in the courts, and I understand that other Senators will cite the particular cases.

"I shall quote from the case of Bell against School Board of Gary, Ind., in which the Federal court of appeals cited the following language from a special three judge district court in Kansas: 'Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.' *Brown v. Board of Education*, D.C. 139 F. Supp. 468, 470.

"In *Briggs v. Elliott* (EDSC), 132, Supp. 776, 777, the Court said: 'The Constitution, in other words, does not require integration. It merely forbids discrimination.' In other words, an overt act by law which demands segregation is unconstitutional. That was the ruling of the historic *Brown* case of 1954." [4]

The language of the Act discloses this twofold Congressional intent:

1. To enforce the Supreme Court rulings that the Equal Protection Clause prohibits the State from denying to any child admission to any school it operates because of the child's race; and

2. To keep overzealous bureaucrats and federal judges from straying beyond constitutional limits in cases involving the desegregation of public schools.

Since no action of his is involved in this case, the amicus curiae pretermits discussion of the provisions of the Civil Rights Act of 1964 relating to the Commissioner of Education.

In phrasing the Act, Congress uses the terms "desegregation" and "discrimination" interchangeably to express the concept made familiar by the prevalent use of the word "discrimination" to mean state action denying persons admission to public colleges or public schools because of their race.

This observation is made indisputable by Section 401(b) which expressly declares that "desegregation" merely means "the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin"; Section 407(a)(1) and (2) which refer to children who "are being deprived by a school board of the equal protection of the laws" and individuals who have "been denied admission" to a public college or permission "to continue at a public college by reasons of race, color, religion, or national origin"; Section 409 which directs its attention to "discrimination in public education"; and Section 410 which stipulates that "nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.

There is not a single syllable in Title IV of the Civil Rights Act of 1964 giving any support to a different interpretation.

Section 401(b) merits further consideration because it specifies not only what Congress means by the term "desegregation," but also what Congress does not mean by that term.

Section 401(b) consists of two clauses. The first clause provides that "desegregation" as used in Title IV "means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin," and the second clause provides that "desegregation" as used in Title IV "shall not mean the assignment of students to public schools in order to overcome racial imbalance."

As a law made by Congress, Title IV is binding on federal judges, and defines their jurisdiction in respect to public schools operated by public school boards acting as state agencies.

The first clause of Section 401(b) commands school boards to ignore race, color, religion, and national origin as factors in assigning students to public schools. Since federal judges have no power to add anything to the laws they enforce, this clause merely confers upon federal judges the limited jurisdiction to enforce its command by decrees which prevent recalcitrant school boards from denying otherwise eligible children admission to schools on account of their race, color, religion, or national origin.

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[2] Senator Byrd was evidently referring to Title IV, instead of Title VI.

[3] Congressional Record, Volume 110, Part 10, Page 12714, June 4, 1964.

[4] Congressional Record, Volume 110, Part 10, page 13821, June 15, 1964.

Since federal judges do not have power to subtract anything from laws they enforce, the second clause of Section 401(b) denies to federal judges jurisdiction to compel school boards to assign "students to public schools in order to overcome racial imbalance." By this clause, Congress forbids federal judges to make decrees compelling school boards to take affirmative steps to commingle black and white children in public schools in proportions satisfactory to themselves to remedy racial imbalances occasioned by de facto residential segregation or non-discriminatory action on the part of school boards.

This interpretation of Section 401(b) is completely confirmed by Section 407, 409, and 410 of Title IV.

Before the enactment of Title IV of the Civil Rights Act of 1964, only the individuals aggrieved thereby had legal standing to make complaint in federal courts concerning state-imposed segregation in public education. They were restricted to seeking relief for themselves and their children and other persons similarly situated. They did not have the right to demand that federal courts should substitute federally coerced integration for state-imposed segregation.

When it drafted Title IV, Congress decided to extend to the Attorney General standing to sue for "such relief as may be appropriate" in behalf of two groups of people if he believes their complaints to be "meritorious" and concludes that they are "unable * * * to initiate and maintain appropriate legal proceedings for" their own "relief." These groups of people are described, in essence, as children who "are being deprived by a school board of the equal protection of the laws" and individuals who have been "denied admission" to a public college or "permission to continue in attendance at a public college by reason of race, color, religion or national origin." To this end, Congress inserted Section 407(a) in Title IV.

At the same time, however, Congress decided to preserve intact the existing rights of individuals to sue in their own behalf for relief against state-imposed segregation. To accomplish this purpose, Congress stipulated in Section 409 that nothing in Title IV "shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education."

Congress was determined, however, not to increase the powers of federal judges when it gave the Attorney General standing to seek relief against descrimination in public education in behalf of the aggrieved persons designated in Section 409(a). Moreover, Congress was equally as determined that federal judges should not have jurisdiction to compel school boards to deny children admission to their neighborhood schools and transport them hither and yon to achieve racial balances in public schools, regardless of whether the racial imbalances sought to be removed to accomplish such purpose arise out of innocent causes or discriminatory action on the part of school boards.

Congress made these purposes manifest by inserting in Section 409(a) language expressly providing "that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

By so doing, Congress deprived all federal courts of the jurisdiction to order public school boards to bus children from one school to another or from one school district to another to remedy racial imbalances in public schools regardless of whether such imbalances arise out of innocent causes or discriminatory school board action. As appears from the cases which the amicus curiae has previously cited, Congress has undoubted power to do this under the First Section of Article III of the Constitution, which empowers it to define the jurisdiction of inferior federal courts, and under the Second Section of Article III of the Constitution, which expressly provides that "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

It necessarily follows that the District Court violated the provisions of the Civil Rights Act of 1964 when it ordered the Charlotte-Mecklenburg School Board to bus thousands of children from some schools to other schools and from some school districts to other school districts to overcome racial imbalances in any of its schools regardless of the origin of such racial imbalances; and that the Circuit Court erred in affirming the provisions of the District Court order relating to the transportation of senior high school and junior high school students.

While such statutes apply to the Executive Department of the Federal Government only, and for that reason are not controlling in this case, it seems not amiss to direct the attention of the Supreme Court to congressional hostility to the busing of children to achieve racial balancing in public schools. Congress manifested its hostility to such action by the Elementary and Secondary Education Act of 1965, as amended in 1966, which forbids "any department, agency, officer, or employee of the United States * * * to require the assignment or transportation of students or teachers in order to overcome racial imbalance," (P.L. 89–10, Title VIII, Section 804; 20 U.S.C. Section 884); the Departments of Labor, and Health, Education, and Welfare Appropriation Act of 1969, which provides that "no part of the funds contained in this Act shall be used to force busing of students * * * in order to overcome racial imbalance as a condition precedent to obtaining Federal funds otherwise available to any State, school district, or school". (P.L. 90–557, Title IV, Section 410); and the Office of Education Appropriation Act of 1971, which provides that "no part of the funds contained in this Act shall be used to force any school or school district which is desegregated as that term is defined in Title IV of the Civil Rights Act of 1964, Public Law 88–352, to take any action to force the busing of students" (P.L. 91–380, Title II, Section 210).

IV

"A School Board has the Power to Devise and Implement any Non-discriminatory Plan for the Assignment of Children to the Public Schools it Operates. The District Court not Only Rejected a Non-discriminatory Assignment Plan Submitted by the Charlotte-Mecklenburg School Board, but it Usurped and Exercised the Authority of the School Board in this Respect by Devising a Plan of its Own Which Commands the School Board to Deny Thousands of Children Admission to Their Neighborhood Schools, and to bus Them to Other Schools to Mix the Races in the Various Schools in Numbers or Proportions Satisfactory to the District Court. By so Doing, the District Court Ordered the School Board to Deny to the Thousands of Children Affected by its Order Admission to Their Neighborhood Schools in Violation of the Equal Protection Clause, and to Bus Them to Other Schools or Other School Districts in Violation of Section 407(a)(2) of the Civil Rights Act of 1964. The Circuit Court Concurred in These Violations, and Erred insofar as it Affirmed the Order of the District Court."

A school board, acting as a state agency, has the power to assign children to the public schools it operates free from interference by the Federal Judiciary as long as it obeys the Equal Protection Clause and does not exclude any child from any school because of the child's race.

When a school board violates the Equal Protection Clause, a Federal Court has jurisdiction to order the school board to devise and implement a plan sufficient to remedy its discriminatory assignment of children to its schools, and to punish the members of the school board for contempt of court if they fail to obey the order. Nevertheless, the power to devise and implement a plan to remedy the discriminatory assignment continues to reside in the school board, and the Federal Court is without power to reject a non-discriminatory plan submitted by the school board because such non-discriminatory plan will not mix the races in the schools in numbers or proportions satisfactory to the Federal Court.

Besides the Federal Court cannot usurp and exercise the power of the School Board to devise a non-discriminatory assignment plan because the Federal Court wishes to mix the races in the schools in greater numbers or proportions than the non-discriminatory plan of the School Board envisages.

The District Court violated all of these principles when it made its order of February 5, 1970 (819a–839a), its supplemental findings of fact of March 21, 1970 (1198a–1220a), and its supplemental memorandum of March 21, 1970 (1221a–1238a).

Pursuant to the order which the District Court had entered on December 1, 1969, the Charlotte-Mecklenburg School Board submitted to the District Court on February 2, 1970 its plan for desegregation of schools (726a–742a). By this plan the School Board undertook to restructure its geographical attendance districts or zones in such a manner as to promote the highest degree of racial integration obtainable by geographical districting or zoning, and to assign all school children, black or white, to the neighborhood schools in the district or zone of their residence, regardless of race. The plan undertook to further augment desegregation by a transfer system heavily weighted in favor of permitting black children to transfer from predominantly black schools to predominantly white schools.

Inasmuch as it treated all children similarly situated exactly alike and did not exclude any child from any school on account of the child's race, the plan submitted by the School Board on February 2, 1970, was in complete harmony with the Equal Protection Clause and it was obligatory for this reason for the District Court to approve it and permit the School Board to implement it.

Instead of doing so, the District Court rejected the nondiscriminatory plan submitted by the School Board, and usurped and exercised the power vested in the School Board by adopting a plan of its own. The District Court accomplished this purpose by engrafting upon the plans of the School Board drastic alterations and revisions recommended by Dr. Finger, which commanded the School Board to deny thousands of children admission to their neighborhood schools, and to bus them long distances from some schools to other schools, and from some school districts or zones to other school districts or zones.

When all is said, the District Court commanded the School Board to take this action to remedy racial imbalances in black schools in northwest Charlotte arising out of de facto residential segregation in that area, and to produce racial commingling in these schools of northwest Charlotte and other schools in other areas in numbers or proportions greater than those envisaged by the plan of the School Board.

The District Court virtually confesses that its order was designed to effect these purposes by this recital which appears in its supplemental findings of fact of March 21, 1970:

"Both Dr. Finger and the school board staff appear to have agreed, and the court finds as a fact, that for the present at least, there is no way to desegregate the all-black schools in Northwest Charlotte without providing (or continuing to provide) bus or other transportation for thousands of children. All plans and all variations of plans considered for this purpose lead in one fashion or another to that conclusion." (1208a)

In addition to usurping and exercising power vested by law in the School Board, the District Court order commands the School Board to violate rights vested in thousands of school children by the Equal Protection Clause and the Civil Rights Act of 1964.

Since the power to assign children to public schools belongs to the school board administering such schools, no child has the constitutional or legal right in the first instance to attend any particular school, but when a school board adopts a non-discriminatory system for assigning children to neighborhood schools in the attendance district or zone of their residence, children acquire, as against every governmental agency except the school board, the legal right to attend the schools to which they have been so assigned. This right is additional to their right not to be excluded from such schools because of their race.

By its previous practices and its plan of February 2, 1970, the School Board had assigned thousands of senior high school, junior high school, and elementary school children to their neighborhood schools in a wholly non-discriminatory fashion.

By its order of February 5, 1970, the District Court commanded the School Board to do two things which clearly offend the Equal Protection Clause. In the first place, the District Court commanded the School Board to treat differently children similarly situated by allowing thousands of children to attend their neighborhood schools, and by excluding thousands of other children from admission to their neighborhood schools; and in the second place, the District Court commanded the School Board to bus the thousands of children excluded from their neighborhood schools to some other schools in other districts or zones to desegregate both their neighborhood schools and the other schools in numbers or proportions satisfactory to the District Court.

No amount of sophistry can erase the plain truth that the second group of children were denied admission to their neighborhood schools on account of their race.

Manifestly, the Equal Protection Clause does not confer upon any Federal Court jurisdiction to enter a wondrous order to compel a school board to obey the Equal Protection Clause by violating it. Congress apparently realized this bizarre result of busing children from one school to another, or from one school district or zone to another district or zone, when it prohibited any officer or Court of the United States to require such action to achieve the racial balancing of schools.

The Circuit Court erred in affirming the order of the District Court rejecting the plan submitted by the School Board, and in affirming, in part, the order of the District Court excluding children from their neighborhood schools and requiring them to be bused to other schools and other school districts in other areas.

CONCLUSION

For the reasons stated, the Court should reverse the provisions of the judgment of the Circuit Court insofar as they relate to the assignment and busing of senior high school and junior high school students; approve the provisions of the judgment of the Circuit Court insofar as they vacate the order of the District Court relating to the assignment and busing of elementary school children; and grant the motion of the School Board to stay the order of the District Court reinstating its previous orders relating to the assignment and busing of elementary school students.

Respectfully submitted,

Sam J. Ervin, Jr.
Charles R. Jonas.
Ernest F. Hollings.

APPENDIX

Constitutional provisions involved

1. The First Section of the Fourteenth Amendment, which reads, in pertinent part, as follows: "nor (shall any State) deny to any person within its jurisdiction the equal protection of the laws."

2. The Fifth Section of the Fourteenth Amendment, which specifies that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article."

3. The First Section of Article III, which states, in pertinent part, that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

4. The Second Section of Article III of the Constitution, which reads, in pertinent part, as follows:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority—to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of Admiralty and Maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States;—between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Statutory Provisions Involved

1. Title IV of the Civil Rights Act of 1964 which originally appeared in Title IV of Public Law 88–352 of the 88th Congress and is now codified as 42 USC 2000c–2000c–9. This statute reads as follows:

"Title VI—Desegregation of Public Education Definitions

"Sec. 401. As used in this title—

"(a) 'Commissioner' means the Commissioner of Education.

"(b) 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance.

"(c) 'Public school' means any elementary or secondary educational institution, and 'public college' means any institution of higher education or any technical or vocational school above the secondary school level, provided that such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source.

"(d) 'School board' means any agency or agencies which administer a system of one or more public schools and any other agency which is responsible for the assignment of students to or within such system.

Survey and Report of Educational Opportunities

"Sec. 402. The Commissioner shall conduct a survey and make a report to the President and the Congress, within two years of the enactment of this title, concerning the lack of availability of equal educational opportunities for individuals by reason of race, color, religion, or national origin in public educational institutions at all levels in the United States, its territories and possessions, and the District of Columbia.

Technical Assistance

"Sec. 403. The Commissioner is authorized, upon the application of any school board, State, municipality, school district, or other governmental unit legally responsible for operating a public school or schools, to render technical assistance to such applicant in the preparation, adoption, and implementation of plans for the desegregation of public schools. Such technical assistance may, among other activities, include making available to such agencies information regarding effective methods of coping with special educational problems occasioned by desegregation, and making available to such agencies personnel of the Office of Education or other persons specially equipped to advise and assist them in coping with such problems.

Training Institutes

"Sec. 404. The Commissioner is authorized to arrange, through grants or contracts, with institutions of higher education for the operation of short-term or regular session institutes for special training designed to improve the ability of teachers, supervisors, counselors, and other elementary or secondary school personnel to deal effectively with special educational problems occasioned by desegregation. Individuals who attend such an institute on a full-time basis may be paid stipends for the period of their attendance at such institute in amounts specified by the Commissioner in regulations, including allowances for travel to attend such institute.

Grants

"Sec. 405. (a) The Commissioner is authorized, upon application of a school board, to make grants to such board to pay, in whole or in part, the cost of—

"(1) giving to teachers and other school personnel in-service training in dealing with problems incident to desegregation, and

"(2) employing specialists to advise in problems incident to desegregation.

"(b) In determining whether to make a grant, and in fixing the amount thereof and the terms and conditions on which it will be made, the Commissioner shall take into consideration the amount available for grants under this section and the other applications which are pending before him, the financial condition of the applicant and the other resources available to it; the nature, extent, and gravity of its problems incident to desegregation; and such other factors as he finds relevant.

Payments

"Sec. 406. Payments pursuant to a grant or contract under this title may be made (after necessary adjustments on account of previously made overpayments or underpayments) in advance or by way of reimbursement, and in such installments, as the Commissioner may determine.

Suits by the Attorney General

"Sec. 407. (a) Whenever the Attorney General receives a complaint in writing—

"(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

"(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, or national origin, and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

"(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

"(c) The term 'parent', as used in this section includes any person standing in loco parentis. A 'complaint' as used in this section is a writing or document within the meaning of section 1001, title 18, United States Code.

"Sec. 408. In any action or proceeding under this title the United States shall be liable for costs the same as a private person.

"Sec. 409. Nothing in this title shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education.

"Sec. 410. Nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.

Ex parte WILLIAM H. McCARDLE.

(See S. C. 7 Wall. 506-515.)

Jurisdiction in cases of habeas corpus—repeal of Act—effect of.

The Act of March, 1868, takes away the jurisdiction defined by the Act of February, 1867, of this court, in cases of habeas corpus.

No judgment can be rendered in a suit, after the repeal of the Act under which it was brought and prosecuted.

This court in such case has no longer jurisdiction of the appeal.

[No. 223.]

Argued Mar. 19, 1869. Decided Apr. 12, 1869.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

This case arose upon a petition for the writ of habeas corpus, filed in the court below by the appellant, alleging unlawful restraint by military force. The writ was issued and return was made, denying that the restraint was unlawful. The court below, upon the hearing, having remanded the petitioner to military custody, he took an appeal to this court. A motion to dismiss this appeal for want of jurisdiction was denied at the last term.

For a full statement of the case, see the opinion of the court, and the report of the decision denying said motion to dismiss.

6 Wall. 318, 18 L. ed. 816.

Messrs. Lyman Trumbull, Matt H. Carpenter, James Hughes, D. G. Swain, and Enoch Totten, for respondents:

It is clear that this court had no jurisdiction of this proceeding and appeal from the circuit court, except under the Act of Feb. 5, 1867; and so this court held on the motion to dismiss made by us.

NOTE.—Effect of statutes to defeat or preserve pending civil actions—see note, 14 L.R.A. 721.

Ex parte McCardle, 6 Wall. 318, 18 L. ed. 816.

When the jurisdiction of a court to determine a case of a class of cases depends upon a statute, and the statute is repealed, the jurisdiction ceases absolutely. If any cause be pending at the time of such repeal it falls.

Rex v. The Justices of London, 3 Burr. 1456; Norris v. Crocker, 13 How. 429; Ins. Co. v Ritchie, 5 Wall. 541, 18 L. ed. 540; Gale v. Wells, 7 How. Pr. 191; Hollingsworth v. Va. 3 Dall. 378; Surtees v. Ellison, 9 B. & C. 750; Butler v. Palmer, 1 Hill. 324.

2. The Act conferring the jurisdiction having been repealed, the jurisdiction ceased; and the court had thereafter no authority to pronounce any opinion or render any judgment in this cause. It can make no difference at what period in the progress of the cause the jurisdiction ceases. After it has ceased, no judicial act formed.

Ins. Co. v. Ritchie, 5 Wall. 541, 18 L. ed. 540; Hollingsworth v. Va. 3 Dall. 378.

In Norris v. Crocker, 13 How. 429, this court affirmed and acted upon the same principle; and the exhausive argument of the present Chief Justice, then at the bar, reported in that case, and the numerous authorities there cited, render any further argument or citation of cases unnecessary.

Rex v. Justices of London, 3 Burr. 1456; Yeaton v. U.S. 5 Cranch, 281; The Rachel v. U.S. 6 Cranch, 329; U.S. v. Preston, 3 Pet. 57; Com. v. Marshall, 11 Pick. 350.

Messrs J. S. Black, W.L. Sharkey, C. T. Botts, and David Dudley Field, for appellant.

(This case was very elaborately argued on the merits, early in March, 1868, prior to the passage of the Act taking from this court jurisdiction of appeals in such cases.

(But as the court does not go into the merits, no abstract of the argument is deemed necessary.)

Mr. Chief Justice Chase delivered the opinion of the court:

This cause came here by appeal from the Circuit Court for the Southern District of Mississippi.

A petition for the writ of habeas corpus was preferred in that court by the appellant, alleging unlawful restraint by military force.

*The writ was issued and a return was [*508 made by the military commander, admitting the restraint, but denying that it was unlawful.

It appeared that the petitioner was not in the military service of the United States, but was held in custody by military authority, for trial before a Military Commission, upon charges founded upon the publication of articles alleged to be incendiary and libelous, in a newspaper of which he was editor.

Upon the hearing, the petitioner was remanded to military custody; but upon his prayer, an appeal was allowed him to this court, and upon filing the usual appeal bond for costs, he was admitted to bail upon recognizance with sureties conditioned for his future appearance in the circuit court, to abide by and perform the final judgment of this court.

A motion to dismiss this appeal was made at the last term, and after argument, was denied. A full statement of the case may be found in the report of this decision and it is unnecessary to repeat it here.

Ex parte McCardle, 6 Wall. 318, 18 L. ed. 516.

Subsequently the case was argued very thoroughly and ably upon the merits, and was taken under advisement. While it was thus held, and before conference in regard to the decision proper to be made, an Act was passed by Congress (Act March 27, 1868, 15 Stat. at L. 44), returned, with objections by the President, and repassed by the constitutional majority, which, it is insisted, takes from this court jurisdiction of the appeal.

The 2d section of this Act was as follows:

"And be it further enacted, that so much of the Act approved February 5, 1867, entitled an 'Act to Amend an Act to Establish the Judicial Courts of the United States,' approved September 24, 1789, as authorized an appeal from the judgment of the circuit court to the Supreme Court of the United States, for the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is hereby repealed."

509*] *The attention of the court was directed to this statute at the last term, but counsel having expressed a desire to be heard in argument upon its effect, and the Chief Justice being detained from his place here by his duties in the Court of Impeachment, the cause was continued under advisement.

At this term we have heard arguments upon the effect of the repealing Act, and will now dispose of the case.

The first question necessarily is that of jurisdiction; for, if the Act of March, 1868, takes away the jurisdiction defined by the Act of February, 1867, it is useless, if not improper, to enter into any discussions of other questions.

It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from Acts of Congress. It is, strictly speaking, conferred 513*] *by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make."

It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. From among the earliest Acts of the first Congress, at its first session, was the Act of September 24th, 1789, to establish the judicial courts of the United States. That Act provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction.

The source of that jurisdiction, and the limitations of it by the Constitution and by statute, have been on several occasions subjects of consideration here. In the case of Durousseau v. U.S. 6 Cranch, 312; Wiscart v. Dauchy, 3 Dall. 321, particularly, the whole matter was carefully examined, and the court held, that while "the appellate powers of this court are not given by the Judicial Act, but are given by the Constitution;" they are, nevertheless, "limited and regulated by that Act, and by such others Acts as have been passed on the subject." The court said, further, that the Judicial Act was an exercise of the power given by the Constitution to Congress "of making exceptions to the appellate jurisdiction of the Supreme Court."

"They have described affirmatively," said the court, "its jurisdiction and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it."

The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that Acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as Acts granting jurisdiction, and not as Acts making exceptions to the constitutional grant of it.

The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other *appellate juris- [*514 diction. It is made in terms. The provision of the Act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus, is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the Legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing Act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.

Several cases were cited by the counsel for the petitioner in support of the position that jurisdiction of this case is not affected by the repealing Act. But none of them, in our judgment, afford any support to it. They are all cases of the exercise of judicial power by the Legislature, or of legislative interference with courts in the exercising of continuing jurisdiction. De Chastellux v. Fairchild, 15 Pa. 18; State v. Fleming, 7 Humph. 152; Lewis v. Webb, 3 Me. 326; Lanier v. Gallatas, 13 La. Ann. 175.

On the other hand, the general rule, supported by the best elementary writers (Dwarris, Stat. 538), is, that "when an Act of the Legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." And the effect of repealing Acts upon suits under Acts repealed, has been determined by the adjudications of this court. The subject was fully considered in Norris v. Crocker, 13 How 429, and more recently in Ins. Co. v. Ritchie, 5 Wall. 541, 18 L. ed. 540. In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the Act under which it was brought and prosecuted.

*It is quite clear, therefore, that this [*515 court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.

Counsel seem to have supposed, if effect be given to the repealing Act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is in error. The Act of 1868 does not except from that jurisdiction any cases but appeals from circuit courts under the Act of 1867. It does not affect the jurisdiction which was previously exercised. **Ex parte McCardle, 6 Wall. 324, 17 L. ed. 817.**

The appeal of the petitioner in this case must be dismissed for want of jurisdiction.

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BROWN ET AL. v. BOARD OF EDUCATION OF TOPEKA ET AL.

NO. 1. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.[†]

Argued December 9, 1952.—Reargued December 8, 1953.—
Decided May 17, 1954.

484 *Robert L. Carter* argued the cause for appellants in No. 1 on the original argument and on the reargument. *Thurgood Marshall* argued the cause for appellants in No. 2 on the original argument and *Spottswood W. Robinson, III*, for appellants in No. 4 on the original argument, and both argued the causes for appellants in Nos. 2 and 4 on the reargument. *Louis L. Redding* and *Jack Greenberg* argued the cause for respondents in No. 10 on the original argument and *Jack Greenberg* and *Thurgood Marshall* on the reargument.

On the briefs were *Robert L. Carter, Thurgood Marshall, Spottswood W. Robinson, III, Louis L. Redding, Jack Greenberg, George E. C. Hayes, William R. Ming, Jr., Constance Baker Motley, James M. Nabrit, Jr., Charles S. Scott, Frank D. Reeves, Harold R. Boulware* and *Oliver W. Hill* for appellants in Nos. 1, 2 and 4 and respondents in No. 10; *George M. Johnson* for appellants in Nos. 1, 2 and 4; and *Loren Miller* for appellants in Nos. 2 and 4. *Arthur D. Shores* and *A. T. Walden* were on the Statement as to Jurisdiction and a brief opposing a Motion to Dismiss or Affirm in No. 2.

Paul E. Wilson, Assistant Attorney General of Kansas, argued the cause for appellees in No. 1 on the original argument and on the reargument. With him on the briefs was *Harold R. Fatzer*, Attorney General.

John W. Davis argued the cause for appellees in No. 2 on the original argument and for appellees in Nos. 2 and 4 on the reargument. With him on the briefs in No. 2 were *T. C. Callison*, Attorney General of South Carolina, *Robert McC. Figg, Jr., S. E. Rogers, William R. Meagher* and *Taggart Whipple*.

485 *J. Lindsay Almond, Jr.*, Attorney General of Virginia, and *T. Justin Moore* argued the cause for appellees in No. 4 on the original argument and for appellees in Nos. 2 and 4 on the reargument. On the briefs in No. 4 were *J. Lindsay Almond, Jr.*, Attorney General, and *Henry T. Wickham*, Special Assistant Attorney General, for the State of Virginia, and *T. Justin Moore, Archibald G. Robertson, John W. Riely* and *T. Justin Moore, Jr.* for the Prince Edward County School Authorities, appellees.

H. Albert Young, Attorney General of Delaware, argued the cause for petitioners in No. 10 on the original argument and on the reargument. With him on the briefs was *Louis J. Finger*, Special Deputy Attorney General.

By special leave of Court, *Assistant Attorney General Rankin* argued the cause for the United States on the reargument, as *amicus curiae*, urging reversal in Nos. 1, 2 and 4 and affirmance in No. 10. With him on the brief were *Attorney General Brownell, Philip Elman, Leon Ulman, William J. Lamont* and *M. Magdelena Schoch*. *James P. McGranery*, then Attorney General, and *Philip Elman* filed a brief for the United States on the original argument, as *amicus curiae*, urging reversal in Nos. 1, 2 and 4 and affirmance in No. 10.

Briefs of *amici curiae* supporting appellants in No. 1 were filed by *Shad Polier, Will Maslow* and *Joseph B. Robison* for the American Jewish Congress; by *Edwin J. Lukas, Arnold Forster, Arthur Garfield Hays, Frank E. Karelsen, Leonard Haas, Saburo Kido* and *Theodore Leskes* for the American Civil Liberties Union et al.; and by *John Ligtenberg* and *Selma M. Borchardt* for the American Federation of Teachers. Briefs of *amici curiae* supporting appellants in No. 1 and respondents in No. 10 were filed by *Arthur J. Goldberg* and *Thomas E. Harris* for the Congress of Industrial Organizations and by 486
Phineas Indritz for the American Veterans Committee, Inc.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.[1]

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[*] Page numbers of the United States Reports appear in the margins for reference, at the point where the page begins.

[†] Together with No. 2, *Briggs et al. v. Elliott et al.*, on appeal from the United States District Court for the Eastern District of South Carolina, argued December 9–10, 1952, reargued December 7–8, 1953; No. 4, *Davis et al. v. County School Board of Prince Edward County, Virginia, et al.*, on appeal from the United States District Court for the Eastern District of Virginia, argued December 10, 1952, reargued December 7–8, 1953; and No. 10, *Gebhart et al. v. Belton et al.*, on certiorari to the Supreme Court of Delaware, argued December 11, 1952, reargued December 9, 1953.

[1] In the Kansas case, *Brown v. Board of Education*, the plaintiffs are Negro children of elementary school age residing in Topeka. They brought this action in the United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in 487 obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, 488 they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy* v. *Ferguson*, 163 U. S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction.[2] Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.[3]

Reargument was largely devoted to the circumstances 489 surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools,

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to maintain separate school facilities for Negro and white students. Kan. Gen. Stat. § 72-1724 (1949). Pursuant to that authority, the Topeka Board of Education elected to establish segregated elementary schools. Other public schools in the community, however, are operated on a nonsegregated basis. The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. 98 F. Supp. 797. The case is here on direct appeal under 28 U. S. C. § 1253.

In the South Carolina case, *Briggs* v. *Elliott*, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. S. C. Const., Art. XI, § 7; S. C. Code § 5377 (1942). The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, denied the requested relief. The court found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 98 F. Supp. 529. This Court vacated the District Court's judgment and remanded the case for the purpose of obtaining the court's views on a report filed by the defendants concerning the progress made in the equalization program. 342 U. S. 350. On remand, the District Court found that substantial equality had been achieved except for buildings and that the defendants were proceeding to rectify this inequality as well. 103 F. Supp. 920. The case is again here on direct appeal under 28 U. S. C. § 1253.

In the Virginia case, *Davis* v. *County School Board*, the plaintiffs are Negro children of high school age residing in Prince Edward County. They brought this action in the United States District Court for the Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Va. Const., § 140; Va. Code § 22-221 (1950). The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, denied the requested relief. The court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to "proceed with all reasonable diligence and dispatch to remove" the inequality in physical plant. But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 103 F. Supp. 337. The case is here on direct appeal under 28 U. S. C. § 1253.

In the Delaware case, *Gebhart* v. *Belton*, the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. They brought this action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Del. Const., Art. X, § 2; Del. Rev. Code § 2631 (1935). The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance involved in travel. 87 A. 2d 862. The Chancellor also found that segregation itself results in an inferior education for Negro children (see note 10, *infra*), but did not rest his decision on that ground. *Id.*, at 865. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. 91 A. 2d 137, 152. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for certiorari. The writ was granted, 344 U. S. 891. The plaintiffs, who were successful below, did not submit a cross-petition.

[2] 344 U. S. 1, 141, 891.

[3] 345 U. S. 972. The Attorney General of the United States participated both Terms as *amicus curiae*.

is the status of public education at that time.[4] In the South, the movement toward free common schools, sup- 490 ported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race.[5] The doctrine of 491 "separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy* v. *Ferguson*, *supra*, involving not education but transportation.[6] American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education.[7] In *Cumming* v. *County Board of Education*, 175 U. S. 528, and *Gong Lum* v. *Rice*, 275 U. S. 78, the validity of the doctrine itself was not challenged.[8] In more recent cases, all on the graduate school level, inequality was found in that specific benefits en- 492 joyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; *Sipuel* v. *Oklahoma*, 332 U. S. 631; *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt* v. *Painter*, *supra*, the Court expressly reserved decision on the question whether *Plessy* v. *Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt* v. *Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors.[9] Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

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[4] For a general study of the development of public education prior to the Amendment, see Butts and Cremin, A History of Education in American Culture (1953), Pts. I, II; Cubberley, Public Education in the United States (1934 ed.), cc. II-XII. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Cremin, *supra*, at 269-275; Cubberley, *supra*, at 288-339, 408-431; Knight, Public Education in the South (1922), cc. VIII, IX. See also H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (*e. g.*, the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, *supra*, at 408-423. In the country as a whole, but particularly in the South, the War virtually stopped all progress in public education. *Id.*, at 427-428. The low status of Negro education in all sections of the country, both before and immediately after the War, is described in Beale, A History of Freedom of Teaching in American Schools (1941), 112-132, 175-195. Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, *supra*, at 563-565.

[5] *Slaughter-House Cases*, 16 Wall. 36, 67-72 (1873); *Strauder* v. *West Virginia*, 100 U. S. 303, 307-308 (1880):

"It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

See also *Virginia* v. *Rives*, 100 U. S. 313, 318 (1880); *Ex parte Virginia*, 100 U. S. 339, 344-345 (1880).

[6] The doctrine apparently originated in *Roberts* v. *City of Boston*, 59 Mass. 198, 206 (1850), upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. Mass. Acts 1855, c. 256. But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

[7] See also *Berea College* v. *Kentucky*, 211 U. S. 45 (1908).

[8] In the *Cumming* case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the *Gong Lum* case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro children and requiring him to attend a Negro school.

[9] In the Kansas case, the court below found substantial equality as to all such factors. 98 F. Supp. 797, 798. In the South Carolina case, the court below found that the defendants were proceeding

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout 493 the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt* v. *Painter, supra*, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin* v. *Oklahoma State Regents, supra*, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." 494 Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." [10]

Whatever may have been the extent of psychological knowledge at the time of *Plessy* v. *Ferguson*, this finding is amply supported by modern authority.[11] Any language in *Plessy* v. *Ferguson* contrary to this finding is 495 rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.[12]

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we

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"promptly and in good faith to comply with the court's decree." 103 F. Supp. 920, 921. In the Virginia case, the court below noted that the equalization program was already "afoot and progressing" (103 F. Supp. 337, 341); since then, we have been advised, in the Virginia Attorney General's brief on reargument, that the program has now been completed. In the Delaware case, the court below similarly noted that the state's equalization program was well under way. 91 A. 2d 137, 149.

[10] A similar finding was made in the Delaware case: "I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated." 87 A. 2d 862, 865.

[11] K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44-48; Frazier, The Negro in the United States (1949), 674-681. And see generally Myrdal, An American Dilemma (1944).

[12] See *Bolling* v. *Sharpe*, *post*, p. 497, concerning the Due Process Clause of the Fifth Amendment.

may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term.[13] The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as *amici curiae* upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.[14]

It is so ordered.

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[13] "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(*a*) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4 (*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (*b*),

"(*a*) should this Court formulate detailed decrees in these cases;

"(*b*) if so, what specific issues should the decrees reach;

"(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

[14] See Rule 42, Revised Rules of this Court (effective July 1, 1954).

BROWN v. BOARD OF EDUCATION

(second *Brown* case)

349 U.S. 294 (1955) at 300, 301

In the second decision in *Brown v. Board of Education*, the United States Supreme Court laid down guidelines for the Federal District Courts to follow in "fashioning and effectuating the decrees" designed to eliminate "a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954 decision." [the first *Brown* case]

The Court continued: "Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants . . . [to act] with good faith. . . . To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system."

The Court then instructed the District Courts "to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."

GREEN ET AL. *v.* COUNTY SCHOOL BOARD OF NEW KENT COUNTY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 695. Argued April 3, 1968.—Decided May 27, 1968.

Respondent School Board maintains two schools, one on the east side and one on the west side of New Kent County, Virginia. About one-half of the county's population are Negroes, who reside throughout the county since there is no residential segregation. Although this Court held in *Brown* v. *Board of Education*, 347 U. S. 483 (*Brown I*), that Virginia's constitutional and statutory provisions requiring racial segregation in schools were unconstitutional, the Board continued segregated operation of the schools, presumably pursuant to Virginia statutes enacted to resist that decision. In 1965, after this suit for injunctive relief against maintenance of allegedly segregated schools was filed, the Board, in order to remain eligible for federal financial aid, adopted a "freedom-of-choice" plan for desegregating the schools. The plan permits students, except those entering the first and eighth grades, to choose annually between the schools; those not choosing are assigned to the school previously attended; first and eighth graders must affirmatively choose a school. The District Court approved the plan, as amended, and the Court of Appeals approved the "freedom-of-choice" provisions although it remanded for a more specific and comprehensive order concerning teachers. During the plan's three years of operation no white student has chosen to attend the all-Negro school, and although 115 Negro pupils enrolled in the formerly all-white school, 85% of the Negro students in the system still attend the all-Negro school. *Held:*

1. In 1955 this Court, in *Brown* v. *Board of Education*, 349 U. S. 294 (*Brown II*), ordered school boards operating dual school systems, part "white" and part "Negro," to "effectuate a transition to a racially nondiscriminatory school system," and it is in light of that command that the effectiveness of the "freedom-of-choice" plan to achieve that end is to be measured. Pp. 435–438.

2. The burden is on a school board to provide a plan that promises realistically to work *now*, and a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is intolerable. Pp. 438–439.

3. A district court's obligation is to assess the effectiveness of the plan in light of the facts at hand and any alternatives which may be feasible and more promising, and to retain jurisdiction until it is clear that state-imposed segregation has been completely removed. P. 439.

4. Where a "freedom-of-choice" plan offers real promise of achieving a unitary, nonracial system there might be no objection to allowing it to prove itself in operation, but where there are reasonably available other ways, such as zoning, promising speedier and more effective conversion to a unitary school system, "freedom of choice" is not acceptable. Pp. 439–441.

5. The New Kent "freedom-of-choice" plan is not acceptable; it has not dismantled the dual system, but has operated simply to burden students and their parents with a responsibility which *Brown II* placed squarely on the School Board. Pp. 441–442.

382 F. 2d 338, vacated in part and remanded.

Samuel W. Tucker and *Jack Greenberg* argued the cause for petitioners. With them on the brief were *James M. Nabrit III*, *Henry L. Marsh III*, and *Michael Meltsner*.

Frederick T. Gray argued the cause for respondents. With him on the brief were *Robert Y. Button*, Attorney General of Virginia, *Robert D. McIlwaine III*, First Assistant Attorney General, and *Walter E. Rogers*.

Louis F. Claiborne argued the cause for the United States, as *amicus curiae*. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Pollak, Lawrence G. Wallace,* and *Brian K. Landsberg*.

Joseph B. Robison filed a brief for the American Jewish Congress, as *amicus curiae,* urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision is whether, under all the circumstances here, respondent School Board's adoption of a "freedom-of-choice" plan which allows a pupil to choose his own public school constitutes adequate compliance with the Board's responsibility "to achieve a system of determining admission to the public schools on a nonracial basis . . . ." *Brown* v. *Board of Education*, 349 U. S. 294, 300–301 (*Brown II*).

Petitioners brought this action in March 1965 seeking injunctive relief against respondent's continued maintenance of an alleged racially segregated school system. New Kent County is a rural county in Eastern Virginia. About one-half of its population of some 4,500 are Negroes. There is no residential segregation in the county; persons of both races reside throughout. The school system has only two schools, the New Kent school on the east side of the county and the George W. Watkins school on the west side. In a memorandum filed May 17, 1966, the District Court found that the "school system serves approximately 1,300 pupils, of which 740 are Negro and 550 are White. The School Board operates one white combined elementary and high school [New Kent], and one Negro combined elementary and high school [George W. Watkins]. There are no attendance zones. Each school serves the entire county." The record indicates that 21 school buses—11 serving the Watkins school and 10 serving the New Kent school—travel overlapping routes throughout the county to transport pupils to and from the two schools.

The segregated system was initially established and maintained under the compulsion of Virginia constitutional and statutory provisions mandating racial segregation in public education, Va. Const., Art. IX, § 140 (1902); Va. Code § 22–221 (1950). These provisions were held to violate the Federal Constitution in *Davis* v. *County School Board of Prince Edward County*, decided with *Brown* v. *Board of Education*, 347 U. S. 483, 487 (*Brown I*). The respondent School Board continued the segregated operation of the system after the *Brown* decisions, presumably on the authority of several statutes enacted by Virginia in resistance to those decisions. Some of these statutes were held to be unconstitutional on their face or as applied.[1] One statute, the Pupil Placement Act, Va. Code § 22–232.1 *et seq.* (1964), not repealed until 1966, divested local boards of authority to assign children to particular schools and placed that authority in a State Pupil Placement Board. Under that Act children were each year automatically reassigned to the school previously attended unless upon their application the State Board assigned them to another school; students seeking enrollment for the first time were also assigned at the discretion of the State Board. To September 1964, no Negro pupil had applied for admission to the New Kent school under this statute and no white pupil had applied for admission to the Watkins school.

The School Board initially sought dismissal of this suit on the ground that petitioners had failed to apply to the State Board for assignment to New Kent school. However on August 2, 1965, five months after the suit was brought, respondent School Board, in order to remain eligible for federal financial aid, adopted a "freedom-of-choice" plan for desegregating the schools.[2] Under that

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[1] *E. g., Griffin* v. *County School Board of Prince Edward County,* 377 U. S. 218; *Green* v. *School Board of City of Roanoke,* 304 F. 2d 118 (C. A. 4th Cir. 1962); *Adkins* v. *School Board of City of Newport News,* 148 F. Supp. 430 (D. C. E. D. Va.), aff'd, 246 F. 2d 325 (C. A. 4th Cir. 1957); *James* v. *Almond,* 170 F. Supp. 331 (D. C. E. D. Va. 1959); *Harrison* v. *Day,* 200 Va. 439, 106 S. E. 2d 636 (1959).

[2] Congress, concerned with the lack of progress in school desegregation, included provisions in the Civil Rights Act of 1964 to deal with the problem through various agencies of the Federal Government. 78 Stat. 246, 252, 266, 42 U. S. C. §§ 2000c *et seq.*, 2000d *et seq.*, 2000h–2. In Title VI Congress declared that

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied plan, each pupil, except those entering the first and eighth grades, may annually choose between the New Kent and Watkins schools and pupils not making a choice are assigned to the school previously attended; first and eighth grade pupils must affirmatively choose a school. After the plan was filed the District Court denied petitioners' prayer for an injunction and granted respondent leave to submit an amendment to the plan with respect to employment and assignment of teachers and staff on a racially nondiscriminatory basis. The amendment was duly filed and on June 28, 1966, the District Court approved the "freedom-of-choice" plan as so amended. The Court of Appeals for the Fourth Circuit, *en banc*, 382 F. 2d 338,[3] affirmed the District Court's approval of the "freedom-of-choice" provisions of the plan but remanded the case to the District Court for entry of an order regarding faculty

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the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U. S. C. § 2000d.

The Department of Health, Education, and Welfare issued regulations covering racial discrimination in federally aided school systems, as directed by 42 U. S. C. § 2000d–1, and in a statement of policies, or "guidelines," the Department's Office of Education established standards according to which school systems in the process of desegregation can remain qualified for federal funds. 45 CFR §§ 80.1–80.13, 181.1–181.76 (1967). "Freedom-of-choice" plans are among those considered acceptable, so long as in operation such a plan proves effective. 45 CFR § 181.54. The regulations provide that a school system "subject to a final order of a court of the United States for the desegregation of such school . . . system" with which the system agrees to comply is deemed to be in compliance with the statute and regulations. 45 CFR § 80.4 (c). See also 45 CFR § 181.6. See generally Dunn, Title VI, the Guidelines and School Desegregation in the South, 53 Va. L. Rev. 42 (1967); Note, 55 Geo. L. J. 325 (1966); Comment, 77 Yale L. J. 321 (1967).

[3] This case was decided *per curiam* on the basis of the opinion in *Bowman* v. *County School Board of Charles City County*, 382 F. 2d 326, decided the same day. Certiorari has not been sought for the *Bowman* case itself.

"which is much more specific and more comprehensive" and which would incorporate in addition to a "minimal, objective time table" some of the faculty provisions of the decree entered by the Court of Appeals for the Fifth Circuit in *United States* v. *Jefferson County Board of Education,* 372 F. 2d 836, aff'd *en banc,* 380 F. 2d 385 (1967). Judges Sobeloff and Winter concurred with the remand on the teacher issue but otherwise disagreed, expressing the view "that the District Court should be directed . . . also to set up procedures for periodically evaluating the effectiveness of the [Board's] 'freedom of choice' [plan] in the elimination of other features of a segregated school system." *Bowman* v. *County School Board of Charles City County,* 382 F. 2d 326, at 330. We granted certiorari, 389 U. S. 1003.

The pattern of separate "white" and "Negro" schools in the New Kent County school system established under compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws. Racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part "white" and part "Negro."

It was such dual systems that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished; school boards operating such school systems were *required* by *Brown II* "to effectuate a transition to a racially nondiscriminatory school system." 349 U. S., at 301. It is of course true that for the time immediately after *Brown II* the concern was with making an initial break in a long-established pattern of excluding

Negro children from schools attended by white children. The principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the "white" schools. See, *e. g., Cooper* v. *Aaron*, 358 U. S. 1. Under *Brown II* that immediate goal was only the first step, however. The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about; it was because of the "complexities arising from the transition to a system of public education freed of racial discrimination" that we provided for "all deliberate speed" in the implementation of the principles of *Brown I*. 349 U. S., at 299–301. Thus we recognized the task would necessarily involve solution of "varied local school problems." *Id.*, at 299. In referring to the "personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis," we also noted that "[t]o effectuate this interest may call for elimination of a variety of obstacles in making the transition . . . ." *Id.*, at 300. Yet we emphasized that the constitutional rights of Negro children required school officials to bear the burden of establishing that additional time to carry out the ruling in an effective manner "is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." *Ibid.* We charged the district courts in their review of particular situations to

> "consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the

defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system." *Id.*, at 300-301.

It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's "freedom-of-choice" plan to achieve that end. The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may "freely" choose the school he will attend. The Board attempts to cast the issue in its broadest form by arguing that its "freedom-of-choice" plan may be faulted only by reading the Fourteenth Amendment as universally requiring "compulsory integration," a reading it insists the wording of the Amendment will not support. But that argument ignores the thrust of *Brown II*. In the light of the command of that case, what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. See *Cooper* v. *Aaron*, *supra*, at 7; *Bradley* v. *School Board*, 382 U. S. 103; cf. *Watson* v. *City of Memphis*, 373 U. S. 526. The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts.[4]

In determining whether respondent School Board met that command by adopting its "freedom-of-choice" plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." *Watson* v. *City of Memphis*, *supra*, at 529; see *Bradley* v. *School Board*, *supra*; *Rogers* v. *Paul*, 382 U. S. 198. Moreover, a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," *Griffin* v. *County School Board*, 377 U. S. 218, 234; "the context in which we must interpret and apply this language [of *Brown II*] to plans for desegregation has been significantly altered."

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[4] "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U. S. 145, 154. Compare the remedies discussed in, *e. g.*, *NLRB* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Standard Oil Co.* v. *United States*, 221 U. S. 1. See also *Griffin* v. *County School Board*, 377 U. S. 218, 232–234.

Goss v. *Board of Education*, 373 U. S. 683, 689. See *Calhoun* v. *Latimer*, 377 U. S. 263. The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.

The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system "at the earliest practicable date," then the plan may be said to provide effective relief. Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed. See No. 805, *Raney* v. *Board of Education*, *post*, at 449.

We do not hold that "freedom of choice" can have no place in such a plan. We do not hold that a "freedom-of-choice" plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decide today is that in desegregating a dual system a plan utilizing "freedom of choice" is not an end in itself. As Judge Sobeloff has put it,

> "'Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a 'unitary, nonracial system.'" *Bowman* v. *County School Board*, 382 F. 2d 326, 333 (C. A. 4th Cir. 1967) (concurring opinion).

Accord, *Kemp* v. *Beasley*, 389 F. 2d 178 (C. A. 8th Cir. 1968); *United States* v. *Jefferson County Board of Education*, *supra*. Although the general experience under "freedom of choice" to date has been such as to indicate its ineffectiveness as a tool of desegregation,[5] there may well be instances in which it can serve as an effective device. Where it offers real promise of aiding a deseg-

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[5] The views of the United States Commission on Civil Rights, which we neither adopt nor refuse to adopt, are as follows:

"Freedom of choice plans, which have tended to perpetuate racially identifiable schools in the Southern and border States, require affirmative action by both Negro and white parents and pupils before such disestablishment can be achieved. There are a number of factors which have prevented such affirmative action by substantial numbers of parents and pupils of both races:

"(a) Fear of retaliation and hostility from the white community continue to deter many Negro families from choosing formerly all-white schools;

"(b) During the past school year [1966–1967], as in the previous year, in some areas of the South, Negro families with children attending previously all-white schools under free choice plans were targets of violence, threats of violence and economic reprisal by white persons and Negro children were subjected to harassment by white regation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, "freedom of choice" must be held unacceptable.

The New Kent School Board's "freedom-of-choice" plan cannot be accepted as a sufficient step to "effectuate a transition" to a unitary system. In three years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents

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classmates notwithstanding conscientious efforts by many teachers and principals to prevent such misconduct;

"(c) During the past school year, in some areas of the South public officials improperly influenced Negro families to keep their children in Negro schools and excluded Negro children attending formerly all-white schools from official functions;

"(d) Poverty deters many Negro families in the South from choosing formerly all-white schools. Some Negro parents are embarrassed to permit their children to attend such schools without suitable clothing. In some districts special fees are assessed for courses which are available only in the white schools;

"(e) Improvements in facilities and equipment . . . have been instituted in all-Negro schools in some school districts in a manner that tends to discourage Negroes from selecting white schools."

Southern School Desegregation, 1966–1967, at 88 (1967). See *id.*, at 45–69; Survey of School Desegregation in the Southern and Border States 1965–1966, at 30–44, 51–52 (U. S. Comm'n on Civil Rights 1966).

with a responsibility which *Brown II* placed squarely on the School Board. The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning,[6] fashion steps which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.

The judgment of the Court of Appeals is vacated insofar as it affirmed the District Court and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

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[6] "In view of the situation found in New Kent County, where there is no residential segregation, the elimination of the dual school system and the establishment of a 'unitary, non-racial system' could be readily achieved with a minimum of administrative difficulty by means of geographic zoning—simply by assigning students living in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins School. Although a geographical formula is not universally appropriate, it is evident that here the Board, by separately busing Negro children across the entire county to the 'Negro' school, and the white children to the 'white' school, is deliberately maintaining a segregated system which would vanish with non-racial geographic zoning. The conditions in this county present a classical case for this expedient." *Bowman v. County School Board, supra,* n. 3, at 332 (concurring opinion).

Petitioners have also suggested that the Board could consolidate the two schools, one site (*e. g.*, Watkins) serving grades 1–7 and the other (*e. g.*, New Kent) serving grades 8–12, this being the grade division respondent makes between elementary and secondary levels. Petitioners contend this would result in a more efficient system by eliminating costly duplication in this relatively small district while at the same time achieving immediate dismantling of the dual system.

These are two suggestions the District Court should take into account upon remand, along with any other proposed alternatives and in light of considerations respecting other aspects of the school system such as the matter of faculty and staff desegregation remanded to the court by the Court of Appeals.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SWANN ET AL. *v.* CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 281. Argued October 12, 1970—Decided April 20, 1971*

The Charlotte-Mecklenburg school system, which includes the city of Charlotte, North Carolina, had more than 84,000 students in 107 schools in the 1968–1969 school year. Approximately 29% (24,000) of the pupils were Negro, about 14,000 of whom attended 21 schools that were at least 99% Negro. This resulted from a desegregation plan approved by the District Court in 1965, at the commencement of this litigation. In 1968 petitioner Swann moved for further relief based on *Green* v. *County School Board*, 391 U. S. 430, which required school boards to "come forward with a plan that promises realistically to work . . . *now* . . . until it is clear that state-imposed segregation has been completely removed." The District Court ordered the school board in April 1969 to provide a plan for faculty and student desegregation. Finding the board's submission unsatisfactory, the District Court appointed an expert to submit a desegregation plan. In February 1970, the expert and the board presented plans, and the court adopted the board's plan, as modified, for the junior and senior high schools, and the expert's proposed plan for the elementary schools. The Court of Appeals affirmed the District Court's order as to faculty desegregation and the secondary school plans, but vacated the order respecting elementary schools, fearing that the provisions for pairing and grouping of elementary schools would unreasonably burden the pupils and the board. The case was remanded to the District Court for reconsideration and submission of further plans. This Court granted certiorari and di-

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*Together with No. 349, *Charlotte-Mecklenburg Board of Education et al.* v. *Swann et al.*, also on certiorari to the same court.

Reproduced by the Congressional Research
Service on April 23, 1971.

rected reinstatement of the District Court's order pending further proceedings in that court. On remand the District Court received two new plans, and ordered the board to adopt a plan, or the expert's plan would remain in effect. After the board "acquiesced" in the expert's plan, the District Court directed that it remain in effect. *Held:*

1. Today's objective is to eliminate from the public schools all vestiges of state-imposed segregation that was held violative of equal protection guarantees by *Brown* v. *Board of Education,* 347 U. S. 483, in 1954. Pp. 10–11.

2. In default by the school authorities of their affirmative obligation to proffer acceptable remedies, the district courts have broad power to fashion remedies that will assure unitary school systems. Pp. 11–12.

3. Title IV of the Civil Rights Act of 1964 does not restrict or withdraw from the federal courts their historic equitable remedial powers. The proviso in 42 U. S. C. § 2000c–6 was designed simply to foreclose any interpretation of the Act as expanding the existing powers of the federal courts to enforce the Equal Protection Clause. Pp. 12–13.

4. Policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities are among the most important indicia of a segregated system, and the first remedial responsibility of school authorities is to eliminate invidious racial distinctions in those respects. Normal administrative practice should then produce schools of like quality, facilities, and staffs. P. 14.

5. The Constitution does not prohibit district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation. *United States* v. *Montgomery County Board of Education,* 395 U. S. 225, was properly followed by the lower courts in this case. Pp. 14–16.

6. In devising remedies to eliminate legally imposed segregation, local authorities and district courts must see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish a dual system. Pp. 16–17.

7. Four problem areas exist on the issue of student assignment:

(1) *Racial quotas.* The constitutional command to desegregate schools does not mean that every school in the community must always reflect the racial composition of the system as a whole; here the District Court's very limited use of the racial ratio—not as an inflexible requirement, but as a starting point

in shaping a remedy—was within its equitable discretion. Pp. 18–21.

(2) *One-race schools.* While the existence of a small number of one-race, or virtually one-race, schools does not in itself denote a system that still practices segregation by law, the court should scrutinize such schools and require the school authorities to satisfy the court that the racial composition does not result from present or past discriminatory action on their part. Pp. 21–22.

An optional majority-to-minority transfer provision has long been recognized as a useful part of a desegregation plan, and to be effective such arrangement must provide the transferring student free transportation and available space in the school to which he desires to move. P. 22.

(3) *Attendance zones.* The remedial altering of attendance zones is not, as an interim corrective measure, beyond the remedial powers of a district court. A student assignment plan is not acceptable merely because it appears to be neutral, for such a plan may fail to counteract the continuing effects of past school segregation. The pairing and grouping of noncontiguous zones is a permissible tool; judicial steps going beyond contiguous zones should be examined in light of the objectives to be sought. No rigid rules can be laid down to govern conditions in different localities. Pp. 23–25.

(4) *Transportation.* The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not effectively dismantle the dual school system is supported by the record, and the remedial technique of requiring bus transportation as a tool of school desegregation was within that court's power to provide equitable relief. An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process; limits on travel time will vary with many factors, but probably with none more than the age of the students. Pp. 25–27.

8. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once a unitary system has been achieved. Pp. 27–28.

431 F. 2d 138, affirmed as to those parts in which it affirmed the District Court's judgment. The District Court's order of August 7, 1970, is also affirmed.

Burger, C. J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 281 AND 349.—OCTOBER TERM, 1970

James E. Swann et al.,
Petitioners,
281 *v.*
Charlotte-Mecklenburg
Board of Education
et al.

Charlotte-Mecklenburg
Board of Education
et al., Petitioners,
349 *v.*
James E. Swann et al.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[April 20, 1971]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of federal courts under this Court's mandates to eliminate racially separate public schools established and maintained by state action. *Brown* v. *Board of Education,* 347 U. S. 483 (1954).

This case and those argued with it [1] arose in states having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what *Brown* v. *Board of Education* was all about. These cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing *Brown I* and the mandate to eliminate dual systems and establish unitary systems at once. Meanwhile district courts and courts of appeals have struggled in hundreds of cases with a multitude and variety of problems under this Court's general directive. Understandably, in an area of evolving remedies, those courts had to improvise and experiment without detailed or specific guidelines. This Court, in *Brown I*, appropriately dealt with the large constitutional principles; other federal courts had to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands. Their efforts, of necessity, embraced a process of "trial and error," and our effort to formulate guidelines must take into account their experience.

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[1] *McDaniel* v. *Barresi,* No. 420; *Davis* v. *Board of School Commissioners of Mobile County,* No. 436; *Moore* v. *Charlotte-Mecklenburg Board of Education,* No. 444; *North Carolina State Board of Education* v. *Swann,* No. 498. For purposes of this opinion the cross-petitions in Nos. 281 and 349 are treated as a single case and will be referred to as "this case."

I

The Charlotte-Mecklenburg school system, the 43d largest in the Nation, encompasses the city of Charlotte and surrounding Mecklenburg County, North Carolina. The area is large—550 square miles—spanning roughly 22 miles east-west and 36 miles north-south. During the 1968–1969 school year the system served more than 84,000 pupils in 107 schools. Approximately 71% of the pupils were found to be white and 29% Negro. As of June 1969 there were approximately 24,000 Negro students in the system, of whom 21,000 attended schools within the city of Charlotte. Two-thirds of those 21,000—approximately 14,000 Negro students—attended 21 schools which were either totally Negro or more than 99% Negro.

This situation came about under a desegregation plan approved by the District Court at the commencement of the present litigation in 1965, 243 F. Supp. 667 (WDNC), aff'd, 369 F. 2d 29 (CA4 1966), based upon geographic zoning with a free transfer provision. The present proceedings were initiated in September 1968 by Petitioner Swann's motion for further relief based on *Green* v. *County School Board,* 391 U. S. 430 (1968), and its companion cases.[2] All parties now agree that in 1969 the system fell short of achieving the unitary school system that those cases require.

The District Court held numerous hearings and received voluminous evidence. In addition to finding certain actions of the school board to be discriminatory, the court also found that residential patterns in the city and county resulted in part from federal, state, and local government action other than school board decisions. School board action based on these patterns, for example, by locating schools in Negro residential areas and fixing the size of the schools to accommodate the needs of immediate neighborhoods, resulted in segregated education. These findings were subsequently accepted by the Court of Appeals.

In April 1969 the District Court ordered the school board to come forward with a plan for both faculty and student desegregation. Proposed plans were accepted by the court in June and August 1969 on an interim basis only, and the board was ordered to file a third plan by November 1969. In November the board moved for an extension of time until February 1970, but when that was denied the board submitted a partially completed plan. In December 1969 the District Court held that the board's submission was unacceptable and appointed an expert in education administration, Dr. John Finger, to prepare a desegregation plan. Thereafter in February 1970, the District Court was presented with two alternative pupil assignment plans—the finalized "board plan" and the "Finger plan."

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[2] *Raney* v. *Board of Education,* 391 U. S. 443 (1968), and *Monroe* v. *Board of Commissioners,* 391 U. S. 450 (1968).

The Board Plan. As finally submitted, the school board plan closed seven schools and reassigned their pupils. It restructured school attendance zones to achieve greater racial balance but maintained existing grade structures and rejected techniques such as pairing and clustering as part of a desegregation effort. The plan created a single athletic league, eliminated the previously racial basis of the school bus system, provided racially mixed faculties and administrative staffs, and modified its free transfer plan into an optional majority-to-minority transfer system.

The board plan proposed substantial assignment of Negroes to nine of the system's 10 high schools, producing 17% to 36% Negro population in each. The projected Negro attendance at the 10th school, Independence, was 2%. The proposed attendance zones for the high schools were typically shaped like wedges of a pie, extending outward from the center of the city to the suburban and rural areas of the county in order to afford residents of the center city area access to outlying schools.

As for junior high schools, the board plan rezoned the 21 school areas so that in 20 the Negro attendance would range from 0% to 38%. The other school, located in the heart of the Negro residential area, was left with an enrollment of 90% Negro.

The board plan with respect to elementary schools relied entirely upon gerrymandering of geographic zones. More than half of the Negro elementary pupils were left in nine schools that were 86% to 100% Negro; approximately half of the white elementary pupils were assigned to schools 86% to 100% white.

The Finger Plan. The plan submitted by the court-appointed expert, Dr. Finger, adopted the school board zoning plan for senior high schools with one modification: it required that an additional 300 Negro students be transported from the Negro residential area of the city to the nearly all-white Independence High School.

The Finger plan for the junior high schools employed much of the rezoning plan of the board, combined with the creation of nine "satellite" zones.[3] Under the satellite plan, inner-city Negro students were assigned by attendance zones to nine outlying predominately white junior high schools, thereby substantially desegregating every junior high school in the system.

The Finger plan departed from the board plan chiefly in its handling of the system's 76 elementary schools. Rather than relying solely upon geographic zoning, Dr. Finger proposed use of zoning, pairing, and grouping techniques, with the result that student bodies throughout the system would range from 9% to 38% Negro.[4]

The District Court described the plan thus:

> "Like the Board plan, the Finger plan does as much by rezoning school attendance lines as can reasonably be accomplished. However, unlike the board plan, it does not stop there. It goes further and desegregates all the rest of the elementary schools by the technique of grouping two or three outlying schools

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[3] A "satellite zone" is an area which is not contiguous with the main attendance zone surrounding the school

[4] In its opinion and order of December 1, 1969, later incorporated in the order appointing Dr. Finger as consultant, the District Court stated:

"Fixed ratios of pupils in particular schools will not be set. If the board in one of its three tries had presented a plan for desegregation, the court would have sought ways to approve variations in pupil ratios. In default of such a plan from the school board, the court will start with the thought . . . that efforts should be made to reach a 71–29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable."

> with one black inner city school; by transporting black students from grades one through four to the outlying white schools; and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black school."

Under the Finger plan, nine inner-city Negro schools were grouped in this manner with 24 suburban white schools.

On February 5, 1970, the District Court adopted the board plan, as modified by Dr. Finger, for the junior and senior high schools. The court rejected the board elementary school plan and adopted the Finger plan as presented. Implementation was partially stayed by the Court of Appeals for the Fourth Circuit on March 5, and this Court declined to disturb the Fourth Circuit's order, 397 U. S. 978 (1970).

On appeal the Court of Appeals affirmed the District Court's order as to faculty desegregation and the secondary school plans, but vacated the order respecting elementary schools. While agreeing that the District Court properly disapproved the board plan concerning these schools, the Court of Appeals feared that the pairing and grouping of elementary schools would place an unreasonable burden on the board and the system's pupils. The case was remanded to the District Court for reconsideration and submission of further plans. This Court granted certiorari, 399 U. S. 926, and directed reinstatement of the District Court's order pending further proceedings in that court.

On remand the District Court received two new plans for the elementary schools: a plan prepared by the United States Department of Health, Education, and Welfare (the HEW plan) based on contiguous grouping and zoning of schools, and a plan prepared by four members of the nine-member school board (the minority plan) achieving substantially the same results as the Finger plan but apparently with slightly less transportation. A majority of the school board declined to amend its proposal. After a lengthy evidentiary hearing the District Court concluded that its own plan (the Finger plan), the minority plan, and an earlier draft of the Finger plan were all reasonable and acceptable. It directed the board to adopt one of the three or in the alternative to come forward with a new, equally effective plan of its own; the court ordered that the Finger plan would remain in effect in the event the school board declined to adopt a new plan. On August 7, the board indicated it would "acquiesce" in the Finger plan, reiterating its view that the plan was unreasonable. The District Court, by order dated August 7, 1970, directed that the Finger plan remain in effect.

II

Nearly 17 years ago this Court held, in explicit terms, that state-imposed segregation by race in public schools denies equal protection of the laws. At no time has the Court deviated in the slightest degree from that holding or its constitutional underpinnings. None of the parties before us challenges the Court's decision of May 17, 1954, that

> "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. . . .
>
> "Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity." *Brown* v. *Board of Education, supra,* at 495.

None of the parties before us questions the Court's 1955 holding in *Brown II*, that

> "[s]chool authorites have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.
>
> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibilty in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown* v. *Board of Education*, 349 U. S. 294, 299–300 (1955).

Over the 15 years since *Brown II*, many difficulties were encountered in implementation of the basic constitutional requirement that the State not discriminate between public school children on the basis of their race. Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then. Deliberate resistance of some to the Court's mandates has impeded the good-faith efforts of others to bring school systems into compliance. The detail and nature of these dilatory tactics have been noted frequently by this Court and other courts.

By the time the Court considered *Green* v. *County School Board,* 391 U. S. 430, in 1968, very little progress had been made in many areas where dual school systems had historically been maintained by operation of state laws. In *Green,* the Court was confronted with a record of a freedom-of-choice program that the District Court had found to operate in fact to preserve a dual system more than a decade after *Brown II.* While acknowledging that a freedom-of-choice concept could be a valid remedial measure in some circumstances, its failure to be effective in *Green* required that

> "The burden on a school board today is to come forward with a plan that promises realistically to work . . . *now* . . . until it is clear that state-imposed segregation has been completely removed." *Green,* at 439.

This was plain language, yet the 1969 Term of Court brought fresh evidence of the dilatory tactics of many school authorities. *Alexander* v. *Holmes County Board of Education,* 396 U. S. 19, restated the basic obligation asserted in *Griffin* v. *School Board,* 377 U. S. 218, 234 (1964), and *Green, supra,* that the remedy must be implemented *forthwith.*

The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts.[5] The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems. This process has been rendered more difficult by changes since 1954 in the structure and patterns of communities, the growth of student population,[6] movement of families, and other changes, some of which had marked impact on school planning, sometimes neutralizing or negating remedial action before it was fully implemented. Rural areas accustomed for half a century to the consolidated school systems implemented by bus transportation could make adjustments more readily than metropolitan areas with dense and shifting population, numerous schools, congested and complex traffic patterns.

III

The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*. That was the basis for the holding in *Green* that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U. S., at 437–438.

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[5] The necessity for this is suggested by the situation in the Fifth Circuit where 166 appeals in school desegregation cases were heard between December 2, 1969, and September 24, 1970.

[6] Elementary public school population (grades 1–6) grew from 17,447,000 in 1954 to 23,103,000 in 1969; secondary school population grew from 11,183,000 in 1954 to 20,775,000 in 1969. Digest of Educational Statistics, 1964 ed. 1, 6, Office of Education Publication # 10024–64; Digest of Educational Statistics, 1970 ed. Table 28, Office of Education Publication # 10024–70.

If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles,* 321 U. S. 329–330 (1944), cited in *Brown II, supra,* at 300.

This allocation of responsibility once made, the Court attempted from time to time to provide some guidelines for the exercise of the district judge's discretion and for the reviewing function of the courts of appeals. However, a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.

In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.

The school authorities argue that the equity powers of federal district courts have been limited by Title IV of the Civil Rights Act of 1964, 42 U. S. C. § 2000c. The language and the history of Title IV shows that it was not enacted to limit but to define the role of the Federal Government in the implementation of the *Brown I* decision. It authorizes the Commissioner of Education to provide technical assistance to local boards in the preparation of desegregation plans, to arrange "training institutes" for school personnel involved in desegregation efforts, and to make grants directly to schools to ease the transition to unitary systems. It also authorizes the Attorney General, in specified circumstances, to initiate federal desegregation suits. Section 2000c (b) defines "desegregation" as it is used in Title IV:

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of

> students to public schools in order to overcome racial imbalance."

Section 2000c–6, authorizing the Attorney General to institute federal suits, contains the following proviso:

> "nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

On their face, the sections quoted purport only to insure that the provisions of Title IV of the Civil Rights Act of 1964 will not be read as granting new powers. The proviso in § 2000c–6 is in terms designed to foreclose any interpretation of the Act as expanding the *existing* powers of federal courts to enforce the Equal Protection Clause. There is no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers. The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called "de facto segregation," where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities. In short, there is nothing in the Act which provides us material assistance in answering the question of remedy for state-imposed segregation in violation of *Brown I.* The basis of our decision must be the prohibition of the Fourteenth Amendment that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

IV

We turn now to the problem of defining with more particularity the responsibilities of school authorities in desegregating a state-enforced dual school system in light of the Equal Protection Clause. Although the several related cases before us are primarily concerned with problems of student assignment, it may be helpful to begin with a brief discussion of other aspects of the process.

In *Green*, we pointed out that existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system. 391 U. S., at 435. Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

When a system has been dual in these respects, the first remedial responsibility of school authorities is to eliminate invidious racial distinctions. With respect to such matters as transportation, supporting personnel, and extracurricular activities, no more than this may be necessary. Similar corrective action must be taken with regard to the maintenance of buildings and the distribution of equipment. In these areas, normal administrative practice should produce schools of like quality, facilities, and staffs. Something more must be said, however, as to faculty assignment and new school construction.

In the companion *Davis* case, the Mobile school board has argued that the Constitution requires that teachers be assigned on a "color blind" basis. It also argues that the Constitution prohibits district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation. We reject that contention.

In *United States* v. *Montgomery County Board of Education,* 395 U. S. 225 (1969), the District Court set as a goal a plan of faculty assignment in each school with a ratio of white to Negro faculty members substantially the same throughout the system. This order was predicated on the District Court finding that

> "The evidence does not reflect any real administrative problems involved in immediately desegregating the substitute teachers, the student teachers, the night school faculties, and in the evolvement of a really legally adequate program for the substantial desegregation of the faculties of all schools in the system commencing with the school year 1968-69." Quoted at 395 U. S., at 232.

The District Court in *Montgomery* then proceeded to set an initial ratio for the whole system of at least two Negro teachers out of each 12 in any given school. The Court of Appeals modified the order by eliminating what it regarded as "fixed mathematical ratios" of faculty and substituted an initial requirement of "substantially or approximately" a five-to-one ratio. With respect to the future, the Court of Appeals held that the numerical ratio should be eliminated and that compliance should not be tested solely by the achievement of specified proportions. *Id.,* at 234.

We reversed the Court of Appeals and restored the District Court's order in its entirety, holding that the order of the District Judge

> "was adopted in the spirit of this Court's opinion in *Green* . . . in that his plan 'promises realistically to

> work, and promises realistically to work *now.*' The modifications ordered by the panel of the Court of Appeals, while of course not intended to do so, would, we think, take from the order some of its capacity to expedite, by means of specific commands, the day when a completely unified, unitary, nondiscriminatory school system becomes a reality instead of a hope. . . . We also believe that under all the circumstances of this case we follow the original plan outlined in *Brown II* . . . by accepting the more specific and expeditious order of [District] Judge Johnson . . . ." 395 U. S., at 235–236 (emphasis in original).

The principles of *Montgomery* have been properly followed by the District Court and the Court of Appeals in this case.

The construction of new schools and the closing of old ones is one of the most important functions of local school authorities and also one of the most complex. They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods.

In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown,* closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight. In devising remedies where legally imposed segregation has been established, it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment is not used and does not serve to perpetuate or re-establish the dual system. When necessary, district courts should retain jurisdiction to assure that these responsibilities are carried out. Cf. *United States* v. *Board of Public Instruction,* 395 F. 2d 66 (CA5 1968); *Brewer* v. *School Board,* 397 F. 2d 37 (CA4 1968).

V

The central issue in this case is that of student assignment, and there are essentially four problem areas:

(1) to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system;

(2) whether every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation;

(3) what are the limits, if any, on the rearrangement of school districts and attendance zones, as a remedial measure; and

(4) what are the limits, if any, on the use of transportation facilities to correct state-enforced racial school segregation.

(1) *Racial Balances or Racial Quotas.*

The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause. The remedy commanded was to dismantle dual school systems.

We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from *Brown I* to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination. We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. This case does not present that question and we therefore do not decide it.

Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

In this case it is urged that the District Court has imposed a racial balance requirement of 71%–29% on individual schools. The fact that no such objective was actually achieved—and would appear to be impossible—tends to blunt that claim, yet in the opinion and order of the District Court of December 1, 1969, we find that court directing:

> "that efforts should be made to reach a 71–29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others . . . , that no school [should] be operated with an all-black or predominantly black student body, [and] that pupils of all grades [should] be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students."

The District Judge went on to acknowledge that variation "from that norm may be unavoidable." This contains intimations that the "norm" is a fixed mathematical racial balance reflecting the pupil constituency of the system. If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

As the voluminous record in this case shows,[7] the predicate for the District Court's use of the 71%–29% ratio was twofold: first, its express finding, approved by the Court of Appeals and not challenged here, that a dual school system had been maintained by the school authorities at least until 1969; second, its finding, also approved by the Court of Appeals, that the school board had totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own, notwithstanding the patient efforts of the District Judge who, on at least three occasions, urged the board to submit plans.[8] As the statement of facts shows, these findings are abundantly supported by the record. It was because of this total failure of the school board that the District Court was obliged to turn to other qualified sources, and Dr.

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[7] It must be remembered that the District Court entered nearly a score of orders, numerous sets of findings and for the most part each was accompanied by a memorandum opinion. Considering the pressure under which the court was obliged to operate we would not expect that all inconsistencies and apparent inconsistencies could be avoided. Our review, of course, is on the orders of February 5, 1970, as amended, and August 7, 1970.

[8] The final board plan left 10 schools 86% to 100% Negro and yet categorically rejected the techniques of pairing and clustering as part of the desegregation effort. As discussed below, the Charlotte board was under an obligation to exercise every reasonable effort to remedy the violation, once it was identified, and the suggested techniques are permissible remedial devices. Additionally, as noted by the District Court and Court of Appeals, the board plan refused to assign white students to any school unless the student population of that school was at least 60% white. This was an arbitrary limitation negating reasonable remedial steps.

Finger was designated to assist the District Court to do what the board should have done.

We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the District Court proceeded to frame a decree that was within its discretionary powers, an equitable remedy for the particular circumstances.[9] As we said in *Green*, a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.

(2) *One-Race Schools.*

The record in this case reveals the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city. In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. Schools all or predominately of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation.

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[9] In his August 3, 1970, memorandum holding that the District Court plan was "reasonable" under the standard laid down by the Fourth Circuit on appeal, the District Court explained the approach taken as follows:

"This court has not ruled, and does not rule that 'racial balance' is required under the Constitution; nor that all black schools in all cities are unlawful; nor that all school boards must bus children or violate the Constitution; *nor that the particular order entered in this case would be correct in other circumstances not before this court.*" (Emphasis in original.)

In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system which still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

An optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan. Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation. In order to be effective, such a transfer arrangement must grant the transferring student free transportation and space must be made available in the school to which he desires to move. Cf. *Ellis* v. *Board of Public Instruction,* 423

F. 2d 203, 206 (CA5 1970). The court orders in this and the companion *Davis* case now provide such an option.

(3) *Remedial Altering of Attendance Zones.*

The maps submitted in these cases graphically demonstrate that one of the principal tools employed by school planners and by courts to break up the dual school system has been a frank—and sometimes drastic—gerrymandering of school districts and attendance zones. An additional step was pairing, "clustering," or "grouping" of schools with attendance assignments made deliberately to accomplish the transfer of Negro students out of formerly segregated Negro schools and transfer of white students to formerly all-Negro schools. More often than not, these zones are neither compact [10] nor contiguous; indeed they may be on opposite ends of the city. As an interim corrective measure, this cannot be said to be beyond the broad remedial powers of a court.

Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

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[10] The reliance of school authorities on the reference to the "revision of . . . attendance areas into *compact* units," *Brown II*, at 300, is misplaced. The enumeration in that opinion of considerations to be taken into account by district courts was patently intended to be suggesive rather than exhaustive. The decision in *Brown II* to remand the cases decided in *Brown I* to local courts for the framing of specific decrees was premised on a recognition that this Court could not at that time foresee the particular means which would be required to implement the constitutional principles announced. We said in *Green, supra,* at 439:

> "The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance."

No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits. The objective is to dismantle the dual school system. "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.

In this area, we must of necessity rely to a large extent, as this Court has for more than 16 years, on the informed judgment of the district courts in the first instance and on courts of appeals.

We hold that the pairing and grouping of non-contiguous school zones is a permissible tool and such action is to be considered in light of the objectives sought. Judicial steps in shaping such zones going beyond combinations of contiguous areas should be examined in light of what is said in subdivisions (1), (2), and (3) of this opinion concerning the objectives to be sought. Maps do not tell the whole story since non-contiguous school zones may be more accessible to each other in terms of the critical travel time, because of traffic patterns and good highways, than schools geographically closer together. Conditions in different localities will vary so widely that no rigid rules can be laid down to govern all situations.

(4) *Transportation of Students.*

The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision. No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations. Bus transportation has been an integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school. Eighteen million of the nation's public school children, approximately 39%, were transported to their schools by bus in 1969–1970 in all parts of the country.

The importance of bus transportation as a normal and accepted tool of educational policy is readily discernible in this and the companion case.[11] The Charlotte school authorities did not purport to assign students on the basis of geographically drawn zones until 1965 and then they allowed almost unlimited transfer privileges. The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.

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[11] During 1967–1968, for example, the Mobile board used 207 buses to transport 22,094 students daily for an average round trip of 31 miles. During 1966–1967, 7,116 students in the metropolitan area were bussed daily. In Charlotte-Mecklenburg, the system as a whole, without regard to desegregation plans, planned to bus approximately 23,000 students this year, for an average daily round trip of 15 miles. More elementary school children than high school children were to be bussed, and four- and five-year-olds travel the longest routes in the system.

Thus the remedial techniques used in the District Court's order were within that court's power to provide equitable relief; implementation of the decree is well within the capacity of the school authority.

The decree provided that the buses used to implement the plan would operate on direct routes. Students would be picked up at schools near their homes and transported to the schools they were to attend. The trips for elementary school pupils average about seven miles and the District Court found that they would take "not over 35 minutes at the most."[12] This system compares favorably with the transportation plan previously operated in Charlotte under which each day 23,600 students on all grade levels were transported an average of 15 miles one way for an average trip requiring over an hour. In these circumstances, we find no basis for holding that the local school authorites may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school.

An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process. District courts must weigh the soundness of any transportation plan in light of what is said in subdivisions (1), (2), and (3) above. It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students. The reconcilation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed.

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[12] The District Court found that the school system would have to employ 138 more buses than it had previously operated. But 105 of those buses were already available and the others could easily be obtained. Additionally, it should be noted that North Carolina requires provision of transportation for all students who are assigned to schools more than one and one-half miles from their homes. N. C. Stat. § 115-186 (b).

VI

The Court of Appeals, searching for a term to define the equitable remedial power of the district courts, used the term "reasonableness." In *Green, supra,* this Court used the term "feasible" and by implication, "workable," "effective," and "realistic" in the mandate to develop "a plan that promises realistically to work, and . . . to work *now.*" On the facts of this case, we are unable to conclude that the order of the District Court is not reasonable, feasible and workable. However, in seeking to define the scope of remedial power or the limits on remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern, and we have sought to suggest the nature of limitations without frustrating the appropriate scope of equity.

At some point, these school authorites and others like them should have achieved full compliance with this Court's decision in *Brown I.* The systems will then be "unitary" in the sense required by our decisions in *Green* and *Alexander.*

It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

For the reasons herein set forth, the judgment of the Court of Appeals is affirmed as to those parts in which it affirmed the judgment of the District Court. The order of the District Court dated August 7, 1970, is also affirmed.

It is so ordered.

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